(9)

No. 89-1793-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Thomas M. Gaubert

Docketed:
May 16, 1990

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Lowell,Abbe David

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Entry	Date	Note	Proceedings and Orders
1	Mar 22 1990	G	Application (A89-674) to extend the time to file a petition for a writ of certiorari from April 5, 1990 to May 7, 1990, submitted to Justice White.
2	Mar 23 1990		Application (A89-674) granted by Justice White extending the time to file until May 7, 1990.
3	Apr 27 1990	G	Application (A89-674) to extend further the time to file a petition for a writ of certiorari from May 7, 1990 to May 21, 1990, submitted to Justice White.
4	Apr 27 1990		Application (A89-674) granted by Justice White extending the time to file until May 17, 1990.
5	May 16 1990	G	Petition for writ of certiorari filed.
6	May 29 1990		DISTRIBUTED. June 14, 1990
7	May 29 1990		Brief of respondent Thomas Gaubert in opposition filed.
8	Jun 5 1990	X	Reply brief of petitioner United States filed.
9	Jun 18 1990		Petition GRANTED.
			**********
10	Jul 11 1990		Record filed.
		*	Certified copy of original record received. (Box).
12	Jul 23 1990		Order extending time to file brief of petitioner on the merits until August 16, 1990.
13	Aug 8 1990		Joint appendix filed.
14	Aug 16 1990		Brief amici curiae of Washington Legal Foundation, et al. filed.
15	Aug 16 1990		Brief of petitioner United States filed.
17	Sep 6 1990		Order extending time to file brief of respondent on the merits until September 28, 1990.
18	Sep 28 1990		Brief of respondent Gaubert filed.
19	Oct 3 1990		CIRCULATED.
21	Oct 19 1990		SET FOR ARGUMENT MONDAY, NOVEMBER 26, 1990. (1ST CASE)
22	Oct 31 1990	X	Reply brief of petitioner United States filed.
23	Nov 26 1990		ARGUED.

89-1793

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether supervisory actions that are taken by federal regulators of financial institutions and that require the exercise of policy discretion fall within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), regardless of whether those actions may be categorized as "operational" in nature.

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The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 885 F.2d 1284. The opinion of the district court (App., *infra*, 21a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1989. A petition for rehearing was denied on January 5, 1990. App., *infra*, 30a. On March 23 and April 27, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including May 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 2680, provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT

This tort action arises out of regulatory activities undertaken by officials of the Federal Home Loan Bank Board (FHLBB or the Board) and the Federal Home Loan Bank-Dallas (FHLB-D), with respect to Independent American Savings Association (IASA), a now-failed Texas thrift institution. Respondent Thomas Gaubert, a major shareholder and former officer of IASA, brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. Respondent contends that he suffered personal financial losses because of IASA's failure, and he alleges that this failure was caused by negligence of federal regulators in their supervision of IASA. The sole issue presented for review is whether the court of appeals correctly interpreted the FTCA's discretionary function exception, 28 U.S.C. 2680(a).

1. *Regulatory Background*

The context within which the actions at issue took place is the extensive statutory scheme for the federal regulation of financial institutions. As a state-chartered thrift institution whose accounts were insured by the Federal Savings and Loan Insurance Corporation (FSLIC), IASA

was subject to federal regulation pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724-1730i (1988).[1]

These statutory powers were entrusted to a number of related federal bodies, all under the overall supervision of the Board. The Board itself was an independent agency of the federal government, with broad responsibilities for the regulation of both federally chartered and state-chartered thrift institutions. See 12 U.S.C. 1437 (1988). FSLIC was a corporation that was established by Congress to provide insurance for deposits in both state and federally chartered thrift institutions and that operated under the direction of the Board. 12 U.S.C. 1725(a) (1988). FSLIC operated in two separate and legally distinct capacities—as a federal regulator (charged with protecting the insurance fund against undue risk by examining and regulating insured institutions), and as a receiver of failed institutions. The Federal Home Loan Banks, including FHLB-D, were regional banks established by the Board for the purpose of assisting member institutions. 12 U.S.C. 1423 (1988). The Board supervised the activities of the various FHLBs, and was specifically empowered to assign to the personnel of any FHLB most of the regulatory functions of the Board itself, or of FSLIC. 12 U.S.C. 1437(a) (1988).

The regulatory powers of greatest relevance here are those provided in 12 U.S.C. 1729 and 1730 (1988). Section 1729(c), for example, empowered the Board, under certain circumstances, to appoint FSLIC as the conservator or receiver of an insured institution. Section 1730 conferred a wide range of enforcement authority on

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[1] The regulatory scheme as here described is that in place at the time of the actions at issue, in 1984 through 1986. As discussed below, many of the regulatory functions have been altered or shifted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183—but not in ways that affect the significance of the ruling below or the need for review. See pp. 20-21, *infra*.

FSLIC, in its regulatory capacity, over state-chartered thrift institutions.[2] For example, Section 1730(b) provided for formal proceedings that could result in the termination of FSLIC insurance. Section 1730(e) provided for proceedings in which FSLIC could issue orders requiring an insured institution to cease and desist from engaging in any practices found either to be in violation of a pertinent statute or regulation, or to constitute an unsafe or unsound banking practice. Section 1730(f) provided for expedited, temporary cease-and-desist orders under certain circumstances. Section 1730(g) provided for the suspension or removal of any officer or director of an insured institution on a number of grounds, including violations of a statute or regulation, or actions in violation of fiduciary duties. Pursuant to 12 U.S.C. 1730(m)(2) (1988), FSLIC also had broad investigatory powers in aid of its regulatory functions.

Not all instances of misconduct or regulatory concern have been handled by institution of such formal proceedings. Like other federal regulators, the Board and FSLIC have often relied on more informal methods of ensuring compliance with regulatory standards. Regulators may, for example, forbear from initiating formal enforcement proceedings in exchange for assurances that regulated parties will refrain from certain conduct or take specified corrective steps. Federal agencies involved in the regulation of financial institutions have turned to such approaches frequently, especially in light of the growing case load confronting those agencies. See generally Vartanian & Schley, *Bank Officer and Director Liability—Regulatory Actions*, 39 Bus. Law. 1021, 1027-1028 (1984). In a policy statement, FHLBB specifically addressed the use of such procedures, noting the appropriateness in many instances of "informal supervisory guidance" or negotiated "supervisory agreement[s]" in

[2] The Board itself directly exercised such authority over federally chartered thrifts, under the analogous provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 (1988).

lieu of formal regulatory steps. See FHLBB Res. No. 82-381 (May 26, 1982).

2. *Factual Background* [3]

In 1983 respondent acquired a controlling interest in Citizens Savings and Loan Association, a federally insured thrift institution chartered by the State of Texas. A new board of directors (of which respondent was the chairman) changed the name of the institution to Independent American Savings Association and embarked upon a course of substantial expansion. The actions on which respondent's complaint is based began with two interrelated events in early 1984. In May 1984, the FHLB-Des Moines requested the institution of an investigation, pursuant to 12 U.S.C. 1730(m)(2) (1988), of certain operations of Capitol Savings and Loan Association, an Iowa institution in which respondent had had

[3] In granting the motion of the United States to dismiss, the district court did not resolve any disputed factual issues. The background stated here is drawn either from the complaint or from certain exhibits to the motion of the United States to dismiss the complaint that were provided to the district court "for background only." Memorandum in Support of Motion of the United States of America to Dismiss the Complaint 32 n.22 (dated Mar. 17, 1988) (Memorandum to Dismiss). These exhibits included various written agreements between federal regulators and respondent or IASA, a January 1987 FHLBB memorandum recommending the appointment of a receiver for IASA, and an April 1987 report by an independent counsel engaged by FHLBB to look into allegations by respondent of misconduct by personnel of FHLB-D, FSLIC, and FHLBB. (These materials are cited below as "Exh. ——.") Exhibits C through J were contained in the administrative record before the Board when the Board decided to place IASA in receivership. Memorandum to Dismiss 5 n.3. Since the government's dismissal motion based on the discretionary function exception went to subject matter jurisdiction, such background materials were properly submitted to the district court. See *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 549 (1969) ("When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other matter to support his motion.").

substantial dealings.[4] During that period, IASA proposed to enter into two transactions that would greatly increase the scope of its operations: the purchase of Investex Savings Association, a troubled Texas thrift institution, and the purchase of 22 branch offices from United Savings Association, another Texas thrift. See Amended Compl. paras. 16-19; Exh. J at 60-63. Completion of these transactions required approval by federal regulators. See 12 U.S.C. 1730(q) (1988); 12 C.F.R. Pt. 574.

In part because of concerns of possible misconduct by respondent relating to the Iowa institution, federal officials had misgivings about permitting substantial expansion of IASA under respondent's control. See Exh. J at 68. Some officials also expressed concern as to whether IASA, with the greatly expanded assets and liabilities it would have following the proposed transactions, would be adequately capitalized. *Id.* at 69. In late 1984, FHLB-D and FHLBB staff recommended the institution of formal proceedings to remove respondent as an officer or director of IASA and prohibit his further involvement with its management (pursuant to 12 U.S.C. 1730(g)(2) (1988)), and the institution of a formal examination of IASA (pursuant to 12 U.S.C. 1730(m)(2) (1988)).[5] Meanwhile, federal regulators were engaged in negotiations with IASA and respondent concerning possible ways of allaying these concerns and allowing the transactions to go forward. See Exh. J at 69-74. These negotiations resulted in the execution in December 1984 of a written "neutralization agreement" between respondent and the federal regulators. See Amended Compl. paras. 12-15; Exh. J at 77-78. The agreement provided that respondent would resign from management positions

[4] See Report of Independent Counsel Aubrey B. Hardwell, Jr., to Chairman Edwin J. Gray, Federal Home Loan Bank Board, at 64-65 (Apr. 21, 1987) (Exh. J.); Amended Compl. para. 12.

[5] See Recommendation for Appointment of a Receiver for Independent American Savings Association at 27-28 (Jan. 21, 1987) (Exh. C).

at IASA and refrain from any participation in the management of the institution, and imposed limits on respondent's ability to vote or transfer his IASA stock. *Ibid.* The agreement also included a guarantee by respondent of IASA's net worth, backed by his pledge of personal assets. See Amended Compl. para. 14; Exh. J at 78.[6] Federal regulators approved the proposed acquisitions noted above, Exh. J at 78, and offered advice and assistance to IASA in carrying out these transactions. Amended Compl. para. 19.

During 1985, investigations continued, and in August 1985 the FHLBB staff recommended the institution of proceedings, pursuant to 12 U.S.C. 1730(g)(2) (1988), permanently to bar respondent from involvement with FSLIC-insured institutions. See Exh. J at 95-105; Exh. C at 31-32. Discussions continued between respondent and federal regulators in late 1985, resulting in a second agreement, set forth in a letter from respondent to the FHLBB dated December 17, 1985. Exh. D. Under the terms of that agreement, respondent agreed to remove himself permanently from IASA's management and not to serve as an officer or director of any FSLIC-insured institution without prior approval. In return, FHLBB agreed to discontinue the investigation it was conducting under 12 U.S.C. 1730(m)(2) (1988) and to forbear from the institution of removal proceedings under 12 U.S.C. 1730(g)(2) (1988).

Early in 1986, additional matters came to light that increased the federal regulators' concerns regarding IASA's soundness. In February and March 1986, IASA received reports from a management consulting firm indicating that IASA was in a precarious financial situation due to numerous possible regulatory violations, in-

[6] Although the complaint characterized the net worth guarantee as "unprecedented," the independent counsel report noted that, while such provisions had not been used frequently, they were "not totally new to the FHLBB" and that there was "mention of imposing such a requirement on new purchasers" in a congressional oversight report. Exh. J at 76.

cluding unsafe and unsound practices. See Exh. C at 39. FHLBB personnel commenced an examination of IASA on March 3, 1986, which also revealed unsafe and unsound financial practices and other regulatory violations. *Id.* at 39-41. In lieu of instituting formal proceedings against IASA, the federal regulators entered into discussions with IASA, as a result of which IASA officers and directors resigned and were replaced by individuals approved by FHLB-D personnel. See Amended Compl. paras. 20-32. FHLB-D provided indemnification of the new officers and directors in order to induce them to take on these responsibilities. *Id.* para. 32; Exh. C at 46.

According to the reports mentioned above and others prepared by accounting and consulting firms, IASA at this time faced substantial difficulties—including books that were not in condition to permit a reliable audit—and the prospect of continuing financial losses. See Exh. C at 47-48. The new IASA officers and directors took various steps aimed at dealing with this situation, such as making major adjustments to IASA's financial statements and placing an IASA subsidiary into bankruptcy. *Id.* at 48-49. During this time, federal regulators continued to forbear from taking formal regulatory actions against IASA, but consulted regularly with IASA personnel about their efforts to deal with the situation. See Amended Compl. paras. 33-37. As alleged in the Amended Complaint, FHLB-D officials frequently gave advice to IASA managers on a variety of topics. *Id.* para. 33. Specifically, the Amended Complaint charges that FHLB-D personnel "arranged for" the hiring of a particular consultant by IASA, urged IASA to convert to federally chartered status, gave advice concerning the placement of subsidiaries into bankruptcy, mediated salary disputes involving IASA officers, reviewed draft litigation papers, and "intervened" in dealings between IASA and a state regulatory body. *Id.* para. 34.

Whether in spite of or (as respondent alleges) because of these efforts, IASA's condition continued to decline. In January 1987, FHLBB began consideration of a recommendation that IASA be put into receivership. See Exh. C. In May 1987, the Texas Savings and Loan Department closed IASA, and FHLBB promptly exercised its authority, pursuant to 12 U.S.C. 1729(c)(2) (1988), to appoint FSLIC as the receiver. See *Gaubert* v. *Hendricks*, 679 F. Supp. 622, 623 (N.D. Tex. 1988).

3. *Proceedings Below*

a. Following the denial of an administrative claim made under 28 U.S.C. 2675, respondent brought this FTCA action in April 1988. The amended complaint contained allegations regarding most of the matters discussed above, including the neutralization agreement, Amended Compl. paras. 12-15 (filed Apr. 11, 1988), the actions surrounding the approval of the Investex merger, *id.* paras. 16-19, the replacement of IASA's management, *id.* paras. 20-26, the installation of a new board of directors, *id.* paras. 27-32, and the subsequent involvement of federal regulators in NASA's "day-to-day operations," *id.* paras. 33-37. The complaint further alleged that federal officials acted negligently in carrying out these activities, *id.* paras. 44-58, and that IASA's insolvency and other problems were caused by such negligence, *id.* paras. 38-39, 49, 59.

The United States moved to dismiss on the ground that the challenged actions were immune from suit under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). The district court granted the motion, holding that all of respondent's claims were barred by that exception. App., *infra*, 21a-26a. The court recognized that the amended complaint focused on actions suggested to IASA by federal regulators, in which IASA was induced to acquiesce by the threat of receivership or other formal regulatory action. *Id.* at 23a-24a. Concluding that a decision to seek receivership would unquestionably fall within the discretionary function exception, the court determined that a decision to exert informal

suasion in lieu of such formal enforcement is likewise discretionary in nature and therefore also within the exception. *Id.* at 24a-25a. Accordingly, the court concluded that the present action fell outside the FTCA's limited waiver of sovereign immunity. *Id.* at 25a-26a.

b. The court of appeals reversed in part, holding that as a matter of law certain actions taken by the federal regulators were not subject to the discretionary function exception. App., *infra*, 1a-20a.

The court began its analysis of the discretionary function exception with a discussion of this Court's ruling in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). App., *infra*, 6a-7a. While acknowledging that the government had not invoked the discretionary function exception in that case, the court of appeals referred to the case as having established a "principled distinction between policy decisions and operational actions" that "still retains its force today and is dispositive of this case." *Id.* at 7a. The court of appeals then discussed this Court's recent discretionary function cases, *United States* v. *Varig Airlines*, 467 U.S. 797 (1984), and *Berkovitz* v. *United States*, 486 U.S. 531 (1988). App., *infra*, 7a-11a. With respect to *Varig*, the court noted this Court's central holding that the discretionary function exception is aimed at "prevent[ing] judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 9a (quoting *Varig*, 467 U.S. at 814). And in *Berkovitz*, the court of appeals observed, the discretionary function exemption had been ruled unavailable where government officials violate express statutory or regulatory requirements. App., *infra*, 10a. The court then stated that the holding in *Berkovitz* was "[u]nfortunately" not dispositive of this case, since FHLBB and FHLB-D officials did not violate any express statutory or regulatory provisions. *Id.* at 11a. The court found guidance, however, in a footnote in *Berkovitz*, which cited *Indian Towing* as an example of a case not involving the sort of policy discretion covered by the discretionary function exception. *Ibid.* (quoting *Berkovitz*, 486 U.S. at 538 n.3). In the court of appeals' view, "[a]ny doubts about the sustained viability of th[e] ["discretionary function/operational activity"] distinction were put to rest" by that footnote. *Ibid.* Thus, the court concluded, any activity that is "operational in nature" necessarily falls outside the scope of the exception. *Id.* at 12a. As the court summarized, "the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in *Indian Towing*." App., *infra*, 12a-13a.

Applying what it called "the *Indian Towing* test," App., *infra*, 13a, to the activities at issue in this case, the court of appeals agreed with the district court about the initial actions taken by the federal regulators. "Clearly, the decision to merge IASA with Investex and seek a neutralization agreement from [respondent] was a policy oriented decision protected by § 2680(a)." App., *infra*, 13a-14a. "Similarly," the court went on, "the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception." *Id.* at 14a. The court held, however, that the federal regulators ceased to perform "discretionary functions"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in ¶¶ 33-43 of [respondent's] Amended Complaint.

Ibid. On the basis of this holding, the court remanded the case to the district court for further proceedings. *Id.* at 19a-20a.[7]

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[7] Because the court of appeals reversed a portion of the district court's judgment on the discretionary function exception, it ad-

REASONS FOR GRANTING THE PETITION

The court of appeals' ruling reflects a serious misreading of the discretionary function exception—an exception that has long been a pivotal limitation on governmental liability under the FTCA. By setting up what it saw as a bright-line distinction based on the "operational" nature of certain activities, the court ignored the fact that many actions that can fairly be characterized as "operational" are nevertheless highly discretionary in nature and are "grounded in social, economic, and political policy." *Varig*, 467 U.S. at 814. Other courts of appeals have recognized that a distinction based on the "operational" nature of government actions is inconsistent with this Court's holding in *Varig*. But the Fifth Circuit's ruling in the present case, which revives this spurious distinction, reflects continuing confusion and division in the circuits. Thus, we believe the time is ripe for the Court to address this recurring issue and make clear that the application of the exception turns on the nature of the discretion exercised, not on such artificial distinctions as that between "planning" or "policy" and "operational" activities.

1. a. As this Court explained in *Varig*, the discretionary function exception is a particularly important limitation on FTCA liability, and was designed principally "to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency." 467 U.S. at 809 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House*

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dressed certain issues pretermitted by the district court. App., *infra*, 14a-20a. The court held that, under Texas law regarding injuries suffered by corporations, respondent could not sue for the alleged diminution of the value of his IASA stock. *Id.* at 19a. But with respect to the personal property respondent posted as a guarantee as part of the neutralization agreement—alleged to be worth $25 million—the court ruled that respondent might be able to maintain a cause of action. *Ibid.* The court remanded the case to the district court for resolution of that issue. *Id.* at 19a-20a.

Committee on the Judiciary, 77th Cong., 2d Sess. 28 (1942) (statement of Assistant Attorney General Francis M. Shea)). The exception has its roots in the constitutional doctrine of separation of powers, since without it the courts would repeatedly be called upon to second-guess political and economic judgments properly entrusted to the Executive Branch. See, *e.g.*, *Laird* v. *Nelms*, 406 U.S. 797, 811-812 n.11 (1972) (Stewart, J., dissenting); *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989); *Kennewick Irrigation District* v. *United States*, 880 F.2d 1018, 1021-1022 (9th Cir. 1989).

The decisions of this Court applying the discretionary function exception have consistently stressed that it is the nature of the discretion exercised, not the level at which action is taken, that defines "discretionary functions" under the exception. Thus, in the seminal case of *Dalehite* v. *United States*, 346 U.S. 15 (1953), involving an explosion on a ship containing fertilizer for a federal export program, the complaint alleged negligence at several levels, from broad policy decisions to the alleged failure "to police the shipboard loading" of the fertilizer. *Id.* at 23-24. In holding that all of these activities fell within the discretionary function exception, the Court stated that the exception

> includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36 (footnote omitted).

In *Varig*, the Court reiterated that principle, 467 U.S. at 811, and applied it to another multi-level complaint, this time involving the conduct of airplane safety inspec-

tions. The Court first upheld the overall decision of the Federal Aviation Administration (FAA) to employ a "spot-check" system to review aircraft designs by manufacturers. *Id.* at 816-820. The Court next recognized that "the acts of FAA employees in executing the 'spot-check' program" were also discretionary in nature because they necessarily involved policy judgments regarding the degree of inspection in particular instances and the taking of "calculated risks" in furtherance of FAA's overall regulatory policies. *Id.* at 820.

The Court's most recent discretionary function decision, *Berkovitz* v. *United States*, *supra*, reaffirms those principles. As the court below recognized, *Berkovitz* dealt principally with a particular problem that is *not* presented here—*i.e.*, governmental activities subject to a "specifically prescribe[d] course of action" set forth in a statute or regulation. 486 U.S. at 536. Where such a prescribed course exists, a federal official must follow it and does not have any "discretion" of the sort that the discretionary function exception was designed to protect. *Ibid.* At the same time, *Berkovitz* reiterated the essential teaching of *Varig*—that the exception applies to all "legislative and administrative decisions grounded in social, economic, and political policy." *Id.* at 537 (quoting *Varig*, 467 U.S. at 814).

b. The analysis of the court of appeals is flatly inconsistent with *Dalehite* and *Varig*. The clear lesson of those cases is that the level at which an action is taken —whether characterized as planning, policy, or operational—is unimportant; what matters is whether a particular decision is "grounded in social, economic, [or] political policy." *Varig*, 467 U.S. at 814. If a particular action meets this test, it is subject to the discretionary function exception, even if it implements some higher-level decision and thus could be characterized as "operational" in nature. This is especially clear from the Court's treatment of allegations regarding the actions of federal employees in policing the loading of ships in *Dalehite* and in inspecting airplanes in *Varig*.

The court of appeals made no effort to compare the "operational" activities in the present case with the implementing activities at issue in *Dalehite* or *Varig*. Nor did it pause to consider whether the actions in question involved discretionary judgments grounded in economic regulatory policy. Had it done so—instead of relying on a talismanic distinction between "operational" and other activities—the court would have been confronted with the discretionary nature of these activities.

In the statutory and regulatory context of the present case, the supervisory actions taken by federal officers and employees were part and parcel of the regulatory process, and were designed to serve the same policies as more formal measures such as cease-and-desist orders, removal of bank officers, and receivership. In either case, the federal regulators act to protect the interest of the public at large in preserving depositor confidence in savings institutions and in safeguarding the fiscal integrity of the federal deposit insurance fund. See generally *Woods* v. *Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1411 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).

As the court of appeals expressly recognized in this case, the authority of federal regulators to pursue these goals by seeking informal cooperation by private institutions—instead of taking more drastic, formal regulatory actions—is "unchallenged." App., *infra*, 12a; see also *Miami Beach Federal Savings & Loan Ass'n* v. *Callander*, 256 F.2d 410, 414-415 (5th Cir. 1958) ("When a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace management, * * * it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency."). The court of appeals also recognized that the federal regulators "did not have regulations telling them, at every turn, how to accomplish their goals for IASA." App., *infra*, 12a. The court failed, however, to draw the logical conclusion that, in advising IASA and recommending courses of action to it,

federal regulators were engaged in the same kinds of discretionary judgments that they engage in when deciding whether and at what point to take more formal actions against an institution.

For example, in advising IASA managers to engage a consultant, close a particular subsidiary, or even file a lawsuit, the federal regulators were making judgments concerning the best way to further the regulatory goals of preserving the institution's soundness in order to safeguard federal deposit insurance funds. Such decisions are unquestionably "grounded in * * * economic * * * policy," *Varig*, 467 U.S. at 814, and should not be subject to judicial second-guessing under the FTCA. Nor can it be doubted that a federal regulator's advice to an institution to convert to federally chartered status is a judgment grounded in regulatory policy. Furthermore, because all of these actions were expressly taken in lieu of more formal regulatory actions, including receivership, federal regulators also had to consider at every juncture whether the particular actions they were advising were likely to produce beneficial results that would justify the agency's continued forbearance from formal proceedings. Whether the particular actions taken turn out to be beneficial or harmful, they constitute precisely the sort of regulatory choices that lie at the heart of the discretionary function exception. See *Varig*, 467 U.S. at 813-814.

c. Neither this Court's decision in *Indian Towing*, *supra*, nor the footnote reference to *Indian Towing* in the *Berkovitz* opinion, provides any justification for the court of appeals' departure from the principles established in *Dalehite* and *Varig*. *Indian Towing* did not even address the discretionary function exception, the inapplicability of which had been conceded by the government. See *Varig*, 467 U.S. at 812 (noting the significance of this fact). Moreover, the court of appeals misread the footnote in the *Berkovitz* opinion discussing *Indian Towing*. 486 U.S. at 538 n.3. As the Court there noted, *Indian Towing* "illuminates" the scope of the discretionary function exception by providing examples of both discretionary and non-discretionary government activity—*i.e.*, the unquestionably discretionary decision to construct and maintain a lighthouse in a particular location, and the non-discretionary activity of keeping the lighthouse in working order. This useful illustration does not purport to provide a comprehensive definition of activities that fall within the discretionary function exception. Still less does it purport to establish a rule that any activity that may be classified as "operational" is, by that fact alone, outside the scope of the exception.

The present case involves a situation that was simply not addressed in either *Indian Towing* or *Berkovitz*—that of governmental activity that is "operational" in the sense that it implements a higher-level regulatory decision, but that nevertheless calls for the exercise of policy discretion. This Court has dealt with such situations, however, in *Dalehite* and *Varig*, and the court of appeals erred in failing to follow the guidance of those cases.

2. The court of appeals' simplistic reliance on the "operational" nature of the actions at issue here was not merely an aberrational ruling. On the contrary, the notion that the discretionary function exception is inapplicable to "operational" activities is a misconception that has cropped up in decisions of the courts of appeals for many years. See, *e.g.*, *United States* v. *Hunsucker*, 314 F.2d 98, 103-104 (9th Cir. 1962) (using distinction between "planning" and "operational" activities); *Fleishour* v. *United States*, 365 F.2d 126, 128 (7th Cir.) (same), cert. denied, 385 U.S. 987 (1966).[8] But see

[8] In drawing this distinction, some cases have relied on this Court's reference to "operational" matters in *Dalehite*, 346 U.S. at 42. See, *e.g.*, *Hunsucker*, 314 F.2d at 103-104; *Emch* v. *United States*, 630 F.2d 523, 527 (7th Cir. 1980), cert. denied, 450 U.S. 966 (1981). As the discussion above shows, however, the *Dalehite* Court did not intend by that term to exclude from the scope of the exception—as the court of appeals did in the present case—actions that implement policy made at a higher level but which themselves in-

Smith v. *United States*, 375 F.2d 243, 246 (5th Cir.) (recognizing that not all "operational" activities fall outside the scope of the exception), cert. denied, 389 U.S. 841 (1967). In our view, this Court's decision in *Varig* squarely rejected that limitation by applying the exception to activities that were operational but that nevertheless entailed significant policy discretion. At least one court of appeals so read the *Varig* opinion, expressly overruling its prior use of the planning/operational distinction as inconsistent with the teachings of *Varig*. See *Begay* v. *United States*, 768 F.2d 1059, 1062-1063 n.2 (9th Cir. 1985).

A review of cases decided since *Varig* (including some decided after *Berkovitz*), however, shows a continuing split of circuit authority on this issue. On the one hand, the Ninth Circuit expressly considered and rejected the notion—crucial to the analysis of the court below in this case—that *Berkovitz* somehow revived the "operational" rule:

> The *Berkovitz* reference to *Indian Towing* must be read in the context of *Dalehite* and *Varig*. A matter does not fall outside the discretionary function exception merely because the decision to embark on an activity has already been made. Were that the case, *Dalehite* and *Varig* would be eviscerated.

Kennewick Irrigation District v. *United States*, 880 F.2d at 1024-1025. The Third, Fourth, Tenth, and District of Columbia Circuits also appear to reject the operational limitation.[9] On the other hand, the Eighth and Eleventh

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volve the exercise of policy discretion. Indeed, the evident ambiguity of the term "operational" provides all the more reason to reject it as a dispositive test.

[9] *U.S. Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *Patterson* v. *United States*, 856 F.2d 670, 673-674 (1988), modified, 881 F.2d 127 (4th Cir. 1989) (en banc); *Allen* v. *United States*, 816 F.2d 1417, 1420-1421 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1195-1196 (D.C. Cir. 1986). See *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 923 (D.C. Cir. 1987) (applying analogous provision of Foreign Sovereign Immunities Act).

Circuits, in addition to the court below, appear to continue to embrace it.[10]

This division is not merely a matter of semantics; it reflects a substantial inconsistency in the application of the FTCA. For example, in *U.S. Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988), an insurer based an FTCA claim on the alleged negligence of an EPA official in directing a toxic waste cleanup. The decisions at issue, such as the timing of operations in light of weather conditions and other considerations, could readily be characterized as "operational" under the test used in the present case, yet the Third Circuit recognized the discretionary nature of such actions. See 837 F.2d at 121-122. Similarly, in *Kennewick Irrigation District*, *supra*, which involved claims of negligence in the Bureau of Reclamation's design and choice of materials following its initial decision to build a canal, the Ninth Circuit recognized a broad range of design decisions (those involving significant "economic" judgments) as being discretionary. See 880 F.2d at 1028-1030. These rulings, in sharp contrast to the decision below, are altogether consistent with the teachings of this Court in *Dalehite* and *Varig*.

3. While this important split in circuit authority would itself be reason enough to warrant this Court's attention, the need for review is underscored by the practical ramifications of the decision below. That decision came at a critical juncture for federal efforts to

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[10] *E. Ritter & Co.* v. *United States*, 874 F.2d 1236, 1241 (8th Cir. 1989); *United States Fire Insurance Co.* v. *United States*, 806 F.2d 1529, 1535-1536 (11th Cir. 1986) (applying discretionary function exception under Public Vessels Act, but relying on FTCA case law). See also *Caplan* v. *United States*, 877 F.2d 1314, 1319 (6th Cir. 1989) (Martin, J., concurring).

regulate financial institutions, particularly thrift institutions. Only a year ago, Congress, responding to what it termed a "crisis" in the thrift industry, enacted major changes in the statutory scheme of thrift regulation. H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. 1, at 294, 302-305 (1989). This crisis, in Congress's view, was brought about by a combination of factors including precipitous growth by many thrift institutions—often accompanied by poor management and fraudulent practices—and the lack of resources for sufficiently vigorous enforcement efforts. *Id.* at 298-301. Congress sought to address these problems by seeking to foster "stronger supervisory oversight." *Id.* at 307-308.

The legislation enacted to address this crisis—the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA)—made major changes in the federal regulatory structure and created new federal agencies to deal with the affairs of failed thrift institutions. At the same time, that law has not altered the basic regulatory tools available to deal with the problems of troubled institutions. For example, while the Act abolished FHLBB and FSLIC and repealed the specific statutory enforcement provisions invoked in this case, see FIRREA §§ 401, 407, 103 Stat. 354-357, 363, that law assigned substantially similar authority for examinations, cease-and-desist orders, and the imposition of receiverships to the Federal Deposit Insurance Corporation (FDIC) and to the newly-created Office of Thrift Supervision (OTS). *Id.* §§ 201, 301, 103 Stat. 187-188, 277-343. Despite other provisions of the Act that enhance enforcement authority in various ways, see *id.* §§ 901-968, 103 Stat. 446-506, these agencies will continue to use the sort of informal, supervisory techniques used in the present case, in an effort to assist regulated institutions without invoking formal regulatory procedures. Indeed, the regulatory workload engendered by the large number of troubled thrift institutions across the Nation will undoubtedly require federal

regulators to employ such techniques in order to provide the "vigilant and responsive" regulatory action mandated by Congress. H.R. Rep. No. 54, *supra*, at 291.

While Congress has recognized a heightened need for decisive and flexible regulatory efforts in this area, the decision below can only hobble and confine such efforts. By exposing the federal fisc to potentially massive liability whenever federal thrift regulators cross an ill-defined line into the "operational" sphere, the court of appeals' ruling will promote frequent judicial second-guessing of regulators' efforts to deal with troubled institutions. Perhaps even more significantly, the spectre of such liability will necessarily discourage regulatory vigor.[11]

Moreover, although the court of appeals purported to acknowledge the propriety of using informal supervision and advice in lieu of formal regulatory action, App., *infra*, 12a, the rule it announced will inevitably skew regulatory intervention toward more formal—and more intrusive—actions. As the courts have repeatedly recognized, decisions to invoke formal regulatory powers, such as declaring a financial institution insolvent and appointing a receiver, are clearly within the scope of the discretionary function exception. See *Golden Pacific Bancorp.* v. *Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988);[12] *Huntington Towers, Ltd.*

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[11] Although respondent has alleged (inaccurately, in our view) that some of the specific actions taken in this case were "unprecedented" (Amended Compl. paras. 13, 14), the court of appeals' reasoning was not tied to any extraordinary feature of this case, but instead was based simply on the "operational" nature of certain activities. It thus states a sweeping rule that will seemingly subject thrift regulators to second-guessing any time they give practical advice to an institution's management in an effort to assist the institution in improving its circumstances in order to obviate more formal regulatory measures.

[12] "The Comptroller, incident to his responsibilities, must make innumerable subtle judgments in describing the content of safe and sound bank practices—judgments that draw upon a mix of law, ac-

v. *Franklin National Bank*, 559 F.2d 863, 869-870 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978); see also *Emch* v. *United States*, *supra* (failure to take regulatory action is a decision within discretionary function exception). Indeed, the court of appeals in the present case appears to recognize this principle by holding that several of the regulators' actions fall within the exception. App., *infra*, 13a-14a. By labeling as "operational" the actions of regulators in advising IASA management of ways to avoid the need for such formal intervention, the court of appeals has created a strong incentive to bypass such advice and instead proceed directly to formal steps. The ruling below thus has the effect of restricting regulatory options at a time of urgent need for swift and flexible intervention.[13] That is precisely the result Congress sought to avoid by enacting the discretionary function exception: The decision below permits the courts, at the behest of private parties, to dictate "policy through the medium of an action in tort." *Varig*, 467 U.S. at 814.

Moreover, the problems created by the court of appeals' ruling will not be limited to federal efforts to deal with the crisis in the thrift industry. As the cases cited above reflect, the discretionary function exception arises in cases involving a wide variety of regulatory and other governmental conduct. Because the court of appeals' ruling purports to rest on a bright-line test of the "operational" nature of governmental conduct, it

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counting, bank custom, and policy. Sometimes, as here, those determinations must be made under grave pressure and expeditiously. The government is not liable in damages merely because in a particular case the Comptroller's conclusion or some aspect of it turns out to be legally vulnerable." *Golden Pacific Bancorp.*, 837 F.2d at 512.

[13] While the decision below will have its most direct impact within the Fifth Circuit—an area of the Nation that has experienced a disproportionate number of thrift failures in recent years—it will also cloud the proper application of the discretionary function exception in those other circuits that have not expressly rejected the Fifth Circuit's "operational" limitation on the scope of the exception.

will promote incorrect analysis, and incorrect results, in a broad range of FTCA cases. Only plenary review by this Court can correct this error and secure the consistent application of the FTCA among the circuits.[14]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[14] While the court of appeals' decision is interlocutory in that it remands to the district court for further proceedings, that decision conclusively resolves the critical issue of the application of the discretionary function exception in this case, by holding that the government's actions do not fit within that exception as a matter of law. This Court has frequently granted certiorari in cases in this posture—involving a court of appeals' ruling reversing an order of dismissal—where an important issue of law has been presented. See *Land* v. *Dollar*, 330 U.S. at 734 n.2; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975). Indeed, in at least one such case the questions involved FTCA exceptions. See *United States* v. *Shearer*, 473 U.S. 52, 54 (1985).

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-1923

THOMAS M. GAUBERT, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

Oct. 17, 1989

Before GEE, GARZA, and JONES, Circuit Judges

GARZA, Circuit Judge:

This case requires us to further define the scope of the discretionary function exception to the Federal Tort Claims Act. Appellant's case below was dismissed for lack of subject matter jurisdiction. We find the discretionary function exception to the Torts Claims Act inapplicable to certain of the alleged actions taken in this case. However, we find that Gaubert does not have standing to sue for the lost value

of his shares, and we must dismiss that part of his suit.

Background

When deciding a motion to dismiss for lack of subject matter jurisdiction under Fed.Rule Civ.Proc. 12(b)(1), we construe the complaint broadly and liberally, although argumentative inferences favorable to the pleader will not be drawn. *Norton v. Larney*, 266 U.S. 511, 45 S.Ct. 145, 69 L.Ed. 413 (1925); *see also* Fed.Rule Civ.Proc. 8(f). We will also accept as true all uncontroverted factual allegations of the pleadings. *Gibbs v. Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111 (1939). We therefore present the facts of this case, which are alleged in Gaubert's complaint, in light of the above standards.

Appellant Thomas M. Gaubert was, at all times relevant to this case, the largest shareholder and chairman of the board of Independent American Savings Association ("IASA"), a Texas state-chartered and federally-insured savings and loan. From January 1983 through March 1986, IASA grew and its financial health remained good.

In the Fall of 1984, officials at the Federal Home Loan Bank Board ("FHLBB") wanted IASA to merge with a failing Texas thrift, Investex Savings. The closing of this transaction was delayed, however, by an investigation of another S & L in which Gaubert had been involved. In order to resolve this impasse, the FHLBB and Federal Home Loan Bank-Dallas ("FHLB-Dallas") requested that Gaubert sign a neutralization agreement in order to secure Gaubert's effective removal from the affairs of IASA. Gaubert agreed to this proposal. Gaubert was also required, as part of the merger transaction, to per-

sonally guarantee that the net worth of IASA would not fall below regulatory minimums. To accomplish this, Gaubert was asked to contribute a personal interest in real estate valued at more than $25 million; Gaubert ultimately lost this property when IASA became insolvent. No other shareholder or director of IASA was required to sign a neutralization agreement, give a personal guarantee, or asked to contribute property.

Officials at the federal agencies then assisted IASA in its merger with Investex by providing regulatory and financial advice. They advised IASA on how it should present the transactions to its shareholders for approval and helped draft proxy statements disclosing Gaubert's neutralization agreement. During this period, IASA was not under a supervisory agreement, receivership, conservatorship, or cease-and-desist order. Rather, the federal involvement came as a result of the inherent persuasive power of the FHLBB, which no doubt arises from the position of authority it occupies; the government euphemistically refers to this ability to pressure S & Ls as "jawboning."

Officials at FHLB-Dallas next sought the replacement of IASA's management and Board of Directors. In February or March of 1986, the Board was told that FHLB-Dallas would close IASA if it did not actively cooperate with this plan. FHLB-Dallas then searched for and selected the new Board of Directors and officers of IASA. In order to persuade the existing directors and officers to resign, Gaubert was freed from his neutralization agreement in return for his efforts to encourage the IASA Board of Directors to resign and allow FHLB-Dallas to pick the new directors and manage IASA.

All IASA directors tendered their undated resignations, even though no proceedings aimed at obtaining

a supervisory agreement had even been initiated for IASA. In April 1986, the directors were replaced, and a former FHLB-Dallas employee was installed as CEO. The other directors and officers, all selected by FHLB-Dallas, were ultimately elected.

After engineering the resignation and replacement of IASA management, officials at FHLB-Dallas actively involved themselves in IASA's affairs and played an increasingly larger role in the day-to-day operations. FHLB-Dallas officials arranged for the hiring of a consulting company on operational and financial matters and asset management. Advice and recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy were given by FHLB-Dallas officials to the IASA Board. Salary disputes between IASA and its senior officers were mediated by FHLB-Dallas, which also reviewed a draft of a complaint in litigation that the Board of Directors contemplated filing. FHLB-Dallas urged that IASA convert from a state-chartered S & L to a federally chartered S & L so that it could become the exclusive government entity with power to control IASA. FHLB-Dallas employees actively intervened with the Texas Savings and Loan Department when the state attempted to install a supervisory agent at IASA.

Shortly after the IASA Board of Directors was replaced, the new directors announced that IASA had over a $400 million negative net worth; this was a surprising development in light of the fact that IASA believed its net worth to be about $74 million positive at the end of 1985. On May 20, 1987, Gaubert filed an administrative tort claim with the FHLBB, FHLB-Dallas, and FSLIC seeking damages in the amount of $75 million for the lost value of his shares, and $25 million for the property he forfeited under

the guarantee agreement; that claim was denied by letter dated November 20, 1987. On May 20, 1987, the IASA was placed into the receivership of FSLIC.

Gaubert filed suit individually in United States District Court for the Northern District of Texas under the Federal Tort Claims Act, 28 U.S.C. § 1346, alleging the negligent selection of directors and officers (Count I) and the negligent involvement in day to day operations (Count II) by federal officials. The government moved for dismissal, citing (1) Gaubert's lack of individual standing as a shareholder of IASA, and (2) lack of subject matter jurisdiction as grounds. The district court granted the motion to dismiss for lack of subject matter jurisdiction on September 28, 1988, and did not reach the issue of standing. Gaubert appeals that dismissal here.

Subject Matter Jurisdiction Under the FTCA

When suing the federal government, a plaintiff must first overcome the bar of sovereign immunity, which establishes that the federal government is not liable for damages resulting from sovereign acts performed by it in its sovereign capacity. *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), is a limited statutory waiver of the federal government's sovereign immunity. The FTCA authorizes suits against the United States for

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee or the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be li-

> able to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

The act, however, contains certain exceptions to the federal government's waiver of immunity. One of these exceptions is known as the Discretionary Function Exception, which reads in pertinent part as follows:

> The provisions of [The FTCA] shall not apply to—
>
> > (a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The district court concluded that this exception to the FTCA was applicable to this case, and therefore dismissed the suit for lack of subject matter jurisdiction. Gaubert contends that the district court's conclusion was in error, since the actions of the FHLBB and FHLB-Dallas lost the protection of the discretionary function exception when they began to assume operational, day-to-day control over IASA. Analysis of this well-taken point requires us to plumb the depths of Supreme Court decisions in this area; it is to this task which we now turn.

An early case in the Supreme Court applying the FTCA to negligence which can be characterized as

being at the "operational level" of governmental activity is *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). That case involved the negligent operation by the Coast Guard of a lighthouse light, resulting in the running aground of a barge. The Coast Guard argued that the FTCA, by its terms, excluded liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of uniquely governmental functions. The Court rejected this argument, noting that the Coast Guard did not have a duty to undertake the lighthouse service, but that "once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order. . . . If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Federal Torts Claims Act." *Id.* at 69, 76 S.Ct. at 126-27.

Although *Indian Towing* established the applicability of the FTCA to unique and operational activities of government, it is not, contrary to Gaubert's assertions, dispositive of the case at bar. The Coast Guard, in *Indian Towing*, expressly conceded that the discretionary function exception of § 2680(a) was inapplicable. The case did, however, establish the principled distinction between policy decisions and operational actions; this distinction still retains its force today and is dispositive of this case. We next turn to more recent Supreme Court precedent for further analysis of the scope of the discretionary function exception to the FTCA.

An oft-cited Supreme Court decision on the scope of the discretionary function exception was *United*

States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984); the government primarily relies on this case to support its argument that the discretionary function exception applies here. In *Varig*, families and representatives of passengers who died in a fire aboard a Boeing 707 aircraft sued the Federal Aviation Administration ("FAA") under the FTCA. The suit alleged negligence of the FAA in certifying that aircraft for use in commercial aviation.[1]

The Supreme Court held that the actions of the FAA fell within the § 2680(a) discretionary function exception. Central to the court's holding was its interpretation of the policy behind the exception, which the court expressed as follows: "It is neither desirable or intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act be tested through the medium of a damage suit for tort." *Varig*, 467 U.S. at 809-10, 104 S.Ct. at 2762. The Court went

[1] The first stage of FAA certification is type certification, in which the FAA approves the basic design of the aircraft which a manufacturer wishes to produce. 49 U.S.C. § 1423(a)(2); 14 C.F.R. § 21.21(a)(1). The next step is the issuance of a production certificate, which requires the manufacturer to prove that it has established and can maintain a quality control system to assure each plane produced will meet the design parameters of the type certificate. 14 C.F.R. §§ 21.139, 21.143. After issuance of a production certificate, production of aircraft may begin, but before they are placed into service, an airworthiness certificate must be obtained for each individual aircraft. The airworthiness certificate denotes that the particular aircraft conforms to the specifications of the type certificate, and is in condition for safe operation. 49 U.S.C. § 1423(c). All evaluation of application for certificates is performed by FAA representatives or by properly qualified and appointed private persons. 14 C.F.R. § 183.29.

on to note that "Congress wished to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814, 104 S.Ct. at 2765.[2] Holding that the decisions made by the FAA regarding proper certification procedure were discretionary, the Supreme Court dismissed plaintiff's suit.

The Supreme Court recently revisited the discretionary function exception in *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). That case involved a suit by an infant against the United States under the FTCA for damages resulting from the infant's contracting polio, allegedly as a result of ingesting a polio vaccine. The complaint specifically alleged that the Division of Biologic Standards ("DBS"), then a part of the National Institute of Health, had acted wrongfully in licensing the production of the vaccine. It also alleged that the Bureau of Biologics of the Food and Drug Administration had wrongfully approved release to the public of the particular lot of vaccine in question.

[2] The *Varig* Court also sought to breathe new life into the previous case of *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (holding the discretionary function exception applied to a fertilizer explosion which had been produced and distributed under the direction of the United States). The viability of *Dalehite* had been questioned following the Supreme Court's decision in *Indian Towing*, as well as in *Union Trust Co. v. Eastern Air Lines Inc.*, 350 U.S. 907, 76 S.Ct. 192, 100 L.Ed. 796 (1955) (summary affirmation permitting suit under FTCA which alleged negligence of air traffic controllers which caused a midair collision between two aircraft trying to land at Washington National Airport).

The Supreme Court held that neither of plaintiff's two allegations were barred by the discretionary function exception. With regard to the first allegation—that the DBS had wrongfully issued a license—the Court held that it was not barred because the DBS had issued a license without first receiving the stat utorily required data showing how the product, at various stages of the manufacturing process, matched up against regulatory safety standards. Since the DBS did not have statutory discretion to issue a license without receiving the required test data, the discretionary function exception could not bar a suit alleging this failure. *Id.* at ——, 108 S.Ct. at 1961-62, 100 L.Ed.2d at 544-45.[3] With regard to the second allegation of negligence—approving the specific lot for release to the public—the Court likewise held that the discretionary function exception was not a bar. Central to the Court's reasoning was that the Bureau's inspection policy did not leave room for an official to exercise policy judgment in performing a given act. Since there was no room for policy judgment, the discretionary function exception did not apply. *Id.* at ——, 108 S.Ct. at 1964-65, 100 L.Ed. 2d at 547-48.

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[3] The court noted that, had plaintiffs claimed that the DBS made a determination that the vaccine complied with regulatory standards, but that the determination was incorrect, the analysis of the applicability of the discretionary function exception would be somewhat different. In that event, the question would be whether the manner and method of determining compliance involved agency judgment of the kind protected by the discretionary function exception, which was the issue presented in *Varig*. The Court did not reach this question, however, due to the fact that the actual licensing decision was carried out in violation of statutory directives.

Unfortunately, the holding in *Berkovitz* is not dispositive of this case. Both allegations of negligent licensing and negligent approval were held to be nondiscretionary because of the existence of statutes in both cases which afforded no room for policy judgment. In the case before us, the actions of the FHLBB and FHLB-Dallas were not as closely guided by statute. The real guidance that we obtain from *Berkovitz* is in its discussion of the discretionary function/operational activity dichotomy which was first established in *Indian Towing*. Any doubts about the sustained viability of that distinction were put to rest by the Court in *Berkovitz*, which noted that

> [t]he decision in *Indian Towing* also illuminates the appropriate scope of the discretionary function exception. . . . The Court stated that the initial decision to undertake and maintain lighthouse service was a discretionary judgment. The Court held, however, that the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA. The latter course of conduct did not involve any permissible exercise of policy judgment.

Id. at ——, 108 S.Ct. at 1959, n. 3, 100 L.Ed.2d at 542, n. 3.

In this case, FHLBB and FHLB-Dallas officials were not acting pursuant to statute when they acted to assume operational control of IASA through their considerable "powers of persuasion." This fact alone, however, does not insulate them from liability. As should now be clear from our above discussion of Supreme Court precedent, there are two distinct strands of conduct to which the discretionary function exception does not apply. The first are cases where the official is acting pursuant to statute, and therefore

has no real discretion, as her actions are pre-ordained by Congress. *See Berkovitz*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531; *Collins v. United States*, 783 F.2d 1225 (5th Cir. 1986) (failure to reclassify a mine as gassy not protected by § 2680 because regulations mandated reclassification, thus leaving no room for policy judgment).

The second type of conduct not encompassed by the discretionary function exception are those actions which are undertaken outside of the strictures of statutory or regulatory mandates, but which are nonetheless operational in nature. That was the case in *Indian Towing*, and is also the case here. The authority of the FHLBB and FHLB-Dallas to take the actions that were taken in this case, although not guided by regulations, is unchallenged. The FHLBB and FHLB-Dallas officials did not have regulations telling them, at every turn, how to accomplish their goals for IASA; this fact, however, does not automatically render their decisions discretionary and immune from FTCA suits.[4] Only policy oriented decisions enjoy such immunity. *Berkovitz* at ——, 108 S.Ct. at 1959, 100 L.Ed.2d at 541; *Varig*, 467 U.S. at 814, 104 S.Ct. at 2764. Thus, the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions be-

[4] Judge Brown made this same point in a concurrence in *Collins v. United States*, 783 F.2d 1225 (5th Cir.1986): "[e]very act of a rational being involves some choices—speed up or slow down, turn right or left, put helm port or starboard, go full astern or full ahead, tighten brakes or replace them, glide in or circle, use general anesthetic or local, use a human heart or a JARVIK 7. It is plain that the discretionary function exception of § 2680(a) must be applied with restraint if the Tort Claims Act is to achieve the dual purposes which motivated its enactment." *Id.* at 1233-34.

came operational in nature and thus crossed the line established in *Indian Towing*.

We discussed the discretionary function exception recently in *B & F Trawlers, Inc. v. United States*, 841 F.2d 626 (5th Cir.1988). In that case, the Coast Guard seized a ship at sea after discovering marijuana on board. While the ship was being towed into port, a fire broke out on board; once in port, the ship was intentionally sunk. Denying the ship owner relief pursuant to the discretionary function exception, this court held that, because the Coast Guard's purpose in towing in the ship was to protect the general public and not the ship owner, the ship owner could not have relied on the Coast Guard to his detriment. Stated another way, the Coast Guard owed no duty of due care to the ship owner since the Coast Guard's actions were not designed to benefit the ship owner.

B & F Trawlers is distinguishable from the present case in that the federal regulators here had two discrete purposes in mind as they commenced day-to-day operations at IASA. First, they sought to protect the solvency of the savings and loan industry at large, and maintain the public's confidence in that industry. Second, they sought to preserve the assets of IASA for the benefit of depositors and shareholders, of which Gaubert was one. Because any actions benefitting the first aim would necessarily further the second, Gaubert as shareholder and guarantor falls within the pool of beneficiaries of government action here. The *B & F Trawlers* rule is therefore inapposite.

We now must apply the *Indian Towing* test to the factual allegations of Gaubert's complaint to determine at which point the federal officials lost their § 2680(a) immunity. Clearly, the decision to merge

IASA with Investex and seek a neutralization agreement from Gaubert was a policy oriented decision protected by § 2680(a). *See* ¶¶ 12-19 of Amended Complaint. Similarly, the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception. *See* ¶¶ 20-32 of Amended Complaint. The point at which the FHLBB and FHLB-Dallas began to assume operational control, and thus lost the protection of § 2680(a), occurred when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in ¶¶ 33-43 of Gaubert's Amended Complaint. We therefore conclude that the district court's dismissal with regard to ¶¶ 12-32 of the Amended Complaint was correct, but that it should not have dismissed ¶¶ 33-43 of the Amended Complaint, as those paragraphs allege negligent operational activities, liability for which is not barred by the discretionary function exception to the FTCA.

Standing

The government argues that, even if there exists a cause of action against it under the FTCA, that cause of action belonged to the corporation, and Gaubert as an individual shareholder does not have standing to assert it.[5] Gaubert is suing in his individual capacity, and does not sue derivatively in the name of the corporation.[6]

[5] The government raised this standing challenge in the district court, but the district court did not address the issue because it dismissed Gaubert's claim on other grounds. We have sufficient information in the record on appeal only to allow us to resolve part of this issue.

Generally, individual shareholders have no separate right to sue for damages suffered by the corporation which result solely in the diminution of the

[6] Gaubert argues on appeal that, in a prior and separate case arising from the same facts, a district court held that he did not have standing to sue derivatively in the name of IASA. *Gaubert v. Hendricks*, 679 F.Supp. 622 (N.D.Tex. 1988). If this court holds that Gaubert does not have standing to sue individually, Gaubert stresses, we will have effectively precluded any sort of review of federal regulatory action. This point is incorrect. Gaubert's prior derivative suit was filed in the name of IASA against officers and directors of IASA. The court held that Gaubert would have had standing to sue prior to the IASA being placed in receivership, had he made sufficient demand on the directors or alleged demand futility. However, once IASA was placed into receivership, FSLIC acquired the right to bring that suit under 12 U.S.C. § 1792(b). Gaubert did not, in that suit, allege a demand upon FSLIC.

In the case at bar, Gaubert in his individual capacity sued FHLBB, FHLB-Dallas, and FSLIC; he has not sought to bring a derivative action against the federal officials. A derivative action is not precluded when a bank is placed into receivership; rather, any demand to bring suit must be made upon the receiver or agency possessing the right to assert the corporation's claims. *Federal Deposit Insurance Corp. v. American Bank Trust Shares, Inc.*, 558 F.2d 711 (4th Cir. 1977); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139 (3d Cir.1973), *cert. denied*, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974); *Womble v. Dixon*, 585 F.Supp. 728 (E.D.Va.1983), *aff'd in part & vacated in part*, 752 F.2d 80 (4th Cir.1984). While this may entail a demand that the federal agencies sue themselves, it is also possible to allege demand futility. In this case Gaubert has not chosen this path, and therefore his argument that our decision, which denies him standing in his individual capacity for the lost value of his shares, will preclude effective review of federal banking officials must fail.

value of the corporation's shares. *Commonwealth of Massachusetts v. Davis*, 140 Tex. 398, 168 S.W.2d 216 (1943); *United States v. Palmer*, 578 F.2d 144 (5th Cir.1978). One rationale behind this prohibition rests on principles of judicial economy. A corporation can protect its shareholder's interest by suing in the corporate name, and if the suit is successful the proceeds will inure to the benefit of the corporation; this increases the value of the individual shares in proportion to the amount of the recovery. Compare this to a situation where all shareholders sue in their individual capacities, which achieves the same resultant recovery, but requires our legal system to process hundreds or thousands of suits, rather than one suit in the name of the corporation.

Another rationale for the prohibition is fairness to creditors of the corporation. Common shareholders are usually at or near the bottom of the corporate financial pecking order. First come the secured then unsecured creditors, then the bondholders in order of preference, then the preferred shareholders, and lastly the common shareholders. Any recovery for injuries to the corporation is paid into the corporation, and the various creditors, bondholders, and equity-holders are "paid" in that order. Were common shareholders allowed to sue directly and individually for damages to the value of their shares, we would be allowing them to bypass the corporate structure and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation.[7]

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[7] The Texas Supreme Court has expressed this concern regarding proper apportionment of the recovery between creditors and equity-holders. "Such actions must be brought by the corporation, not alone to avoid a multiplicity of suits by the various stockholders and to bar a subsequent suit by the corporation, but in order that the damages so recovered may be available for the payment of the corporation's creditors, and for proportional distribution to the stockholders as dividends, or for such such other purposes as the directors may determine." *Commonwealth of Massachusetts v. Davis*, 140 Tex. 398, 168 S.W.2d 216, 221 (1942).

Responding to the above concerns, most states vest the authority to pursue or decline suits for injuries to the corporation in the board of directors, and this decision is usually protected by the business judgment presumption. Texas law is especially stringent in this regard: a corporate shareholder does not have an individual cause of action for personal damages caused solely by a wrong done to the corporation. *Davis*, 168 S.W.2d at 221. However, Texas makes an exception to this general rule: a corporate stockholder may have an action for personal damages for wrongs done to him as an individual stockholder "where the wrongdoer violates a duty arising from contract or otherwise and owing directly by him to the stockholder." *Davis*, 168 S.W.2d at 222; *accord Stinnett v. Paramount-Lasky Corp.*, 37 S.W.2d 145, 149-51 (Tex.Comm'n App.1931, holding approved). Texas, however, puts stringent restrictions on this right of action:

> The [exception] is not sufficiently comprehensive to include within such suits damages arising from the wrongful acts *merely because the acts complained of resulted in damage both to the corporation and to the stockholder.* Such a suit is permitted only when the wrongs are such as to give to the stockholder personally a right of action. If the injuries complained of are such as to give to the corporation a cause of action upon

> damages occasioned to it, the stockholder has no right to bring suit therefore, but if there is a contract or other liability of which the stockholder personally is the beneficiary, the cause of action arises to him as with any other cause of action he might have under the same circumstances.

Cullum v. General Motors Acceptance Corp., 115 S.W.2d 1196, 1201 (Tex.Civ.App.—Amarillo 1938, no writ) (emphasis supplied); *also quoted in McDonald v. Bennett*, 674 F.2d 1080, 1086 (5th Cir. 1982).

Gaubert first argues that he has individual standing as a result of the neutralization agreement which he signed. The terms of that agreement recited that, in consideration of the FSLIC discontinuing its review of other transactions in which Gaubert was involved, Gaubert would not serve as a director, officer, agent or employee of IASA. Moreover, Gaubert agreed not to participate in any way in the affairs of IASA or its subsidiaries, and not to vote the common stock that he owned. The agreement expressly reserved to Gaubert, however, the right to sell all or part of his shares. As a result of this agreement, Gaubert argues that he was prevented from protecting his agreement at the very time federal officials began to assume day to day control over IASA, and as a result he suffered unique injury separate and distinct from all other IASA shareholders.

We find this standing argument unpersuasive. While this court, for the purpose of review, accepts Gaubert's factual allegations as true, we differ with his characterization of their legal import. The neutralization agreement was a contract, supported by adequate consideration. Gaubert has not alleged in

his complaint a breach of that contract, fraudulent inducement, or any other set of facts which would give him a *personal* cause of action based on the agreement, *separate and apart* from his FTCA allegations against FHLBB and FHLB-Dallas. Gaubert suffered no injury as a result of the neutralization agreement that was not suffered by all the other IASA shareholders—the loss of the value of their shares. This being the case, Texas law does not permit Gaubert an individual cause of action against the FHLBB and FHLB-Dallas. Moreover, Gaubert was not required to sit idly by while FHLBB and FHLB-Dallas officials ran his bank into the ground: at all times, he had the ability, which was expressly reserved in the neutralization agreement, to sell his shares at market value and invest the proceeds elsewhere. We therefore conclude that the neutralization agreement does not give Gaubert standing as an individual to recover the lost value of his shares, and therefore dismiss Gaubert's action in that regard for lack of standing.

Gaubert has also alleged that the guarantee agreement, which he was "required" to sign in order to effectuate the merger, gives him an independent cause of action. Gaubert pledged property valued at about $25 million, which he ultimately lost when the IASA's financial situation deteriorated. Gaubert may have a personal cause of action against FHLBB, FHLB-Dallas, and FSLIC for causing the deterioration of IASA resulting in the loss of his property under the guarantee agreement. Unfortunately, we do not have sufficient information in the record to allow us to pass on whether Gaubert has a cause of action in this regard, as it may depend on whether there was an express or implied promise as part of the guarantee that the federal officials would not negli-

gently cause the deterioration of the corporation. We therefore remand Gaubert's action for loss of property valued at $25 million to the district court to determine whether a valid claim is presented. As a point of clarification, if Gaubert is found by the district court to have a cause of action for the lost property, he may not use that cause to assert standing to sue for the $75 million lost value of his shares.

Conclusion

The order of the district court with regard to subject matter jurisdiction is AFFIRMED IN PART and REVERSED IN PART. Gaubert's claim for the lost value of his shares is DISMISSED for lack of standing, and his claim for $25 million in lost property is REMANDED for further consideration.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-87-2989-T

THOMAS M. GAUBERT, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER GRANTING MOTION TO DISMISS

[Filed Sept. 28, 1988]

On May 10, 1988, Defendant filed its Renewed Motion to Dismiss.

Plaintiff filed his Amended Complaint on April 11, 1988. In the complaint, Plaintiff seeks to hold Defendant United States liable for the actions of the Federal Home Loan Bank of Dallas (FHLB-Dallas), the Federal Home Loan Bank Board (FHLBB), and the Federal Savings and Loan Insurance Corporation (FSLIC) (collectively referred to as "the Agencies"). Plaintiff alleges that with the assistance of the FHLBB and the FSLIC, the FHLB-Dallas assumed the duty of day-to-day management of Independent American Savings Association (IASA) and that it was negligent in carrying out that duty. It is Plaintiff's theory that the FHLB-Dallas assumed the duty of care in selecting directors and

officers to run IASA, that it breached that duty and caused IASA to fail, and that IASA, its directors, officers, and shareholders relied on the officers and directors whom the FHLB-Dallas had chosen.

Plaintiff alleges that he was the largest shareholder of IASA and that he lost the total value of his shareholder investment in addition to property worth $25 million when the FHLB-Dallas negligently caused IASA to become insolvent, and seeks $100 million in damages.

Defendant moves to dismiss on the ground that 1) Plaintiff lacks standing to sue and 2) this Court lacks subject matter jurisdiction. Because Defendant's second ground is clearly dispositive of the issues in this case, the Court shall address that ground first.

Generally, in a suit against the federal government, the plaintiff must overcome the bar of sovereign immunity. *Ellis v. Naval Air Rework Facility*, 404 F. Supp. 377 (N.D.Cal. 1975). The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), authorizes suits against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

That act, however, contains certain exceptions to the federal government's waiver of sovereign immunity. One of these exceptions, which Defendant contends is applicable here, is known as the "Discretionary Function Exception." That exception is found in 28 U.S.C. § 2680(a), and states:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Defendant contends that the regulation of the national savings and loan industry is a discretionary function and as such falls within the foregoing exception to the FTCA. Although Defendant does not cite the Court to the source of the Agencies' discretionary authority, the Court is of the opinion that 12 U.S.C. § 1464 grants broad discretionary authority to the FHLBB to regulate the savings and loan industry.

The majority of the agencies' actions about which Plaintiff complains, however, are actions which the Agencies took before formally placing IASA in receivership. Specifically, Plaintiff alleges that the Agencies sought and obtained Plaintiff's "voluntary temporary" removal from IASA; required him to personally guarantee that the net worth of IASA not fall below regulatory minimums; suggested that Plaintiff contribute his personal interest in some property valued at $25 million to the merger and acquisition transactions which the Agencies engineered between IASA and another Texas savings and loan; assisted IASA in completing the merger and acquisition; engineered the replacement of IASA's manage-

ment and board of directors; told IASA's board of directors that if it did not cooperate with the replacement plan that FHLB-Dallas would close IASA; and replaced IASA's management with unqualified, incompetent people who caused IASA's financial ruin.

All of these actions, Plaintiff alleges, were taken at a time when IASA was not in receivership or under any supervisory agreement with the Agencies and while there were no federal regulatory consent agreements or cease and desist orders in effect. Essentially, Plaintiff argues, the Agencies had no legal authority to demand any directorship or management changes at IASA and they went beyond their normal regulatory role by participating and becoming the *de facto* decision-makers for the operations of IASA. In so doing, Plaintiff contends that the Agencies' actions were outside their statutory responsibility, and that once they assumed the day-to-day affairs and operations of IASA, the Agencies also assumed the duty of exercising due care in conducting those operations. The failure to exercise due care, Plaintiff asserts, is actionable negligence under the FTCA.

The Court notes that the majority of Plaintiff's complaints regard actions which the Agencies induced Plaintiff or IASA's board of directors to take, upon threat of being placed in receivership. As the Court discusses below, the Agencies would have been within their discretionary authority to place IASA in receivership. If Plaintiff had objected to the actions which the Agencies were taking in lieu of placing IASA in receivership, Plaintiff could have refused to cooperate and allowed the Agencies to carry out their threat of receivership. The fact that Plaintiff cooperated when he could have refused will not give Plaintiff a cause of action where he otherwise would have none.[1]

It is undisputed that had the Agencies exercised their discretionary authority to place IASA in receivership when they began their examination of IASA in late 1984, their decision to do so would have fallen within the discretionary function exception to the FTCA. It follows, then, that the Agencies had the discretionary authority to *not* place IASA in receivership in 1984, i.e. the Agencies had the discretionary authority not to act. It appears that when the Agencies exercised their discretionary authority not to act, they attempted to obtain acquiescence to their management of IASA outside the regulatory scheme. The question is, then, whether the Agencies will incur liability under the FTCA for taking the actions they did, in lieu of placing IASA in receivership. This Court considers those actions to be an extension of the Agencies' discretion not to place IASA in receivership in 1984.

The statutory waiver of sovereign immunity found in the FTCA must be construed strictly and in such a way as to favor the sovereign. *Shubert Construction Co., Inc. v. Seminole Tribal Housing Authority*, 490 F. Supp. 1008 (S.D.Fla. 1980). If the FTCA does not contain an explicit waiver of sovereign immunity for a particular action, none exists. Therefore, for acts performed as an extension of a discretionary act to be considered non-discretionary and actionable under the FTCA, the FTCA must explicitly waive sovereign immunity for those acts. Otherwise, acts taken in extension of a discretionary func-

[1] The Court notes that under 12 U.S.C. § 1464(d)(6)(A), IASA could have brought an action seeking the removal of a wrongfully appointed receiver.

tion fall in the safety net created by the discretionary function exception, and are not actionable.

Upon examination of the FTCA and the discretionary function exception, the Court finds that there is no provision which renders acts taken as an extension of a discretionary function actionable under the FTCA. Because no explicit waiver of sovereign immunity has been created for such acts, the Court finds that none exists. Therefore, Plaintiff cannot maintain his action under the FTCA against the sovereign.

In conclusion, this Court is of the opinion that the actions of which Plaintiff complains fall within the discretionary function exception to the FTCA and therefore this Court does not have subject matter jurisdiction over his claims.

It is therefore ORDERED that Defendant's motion to dismiss is granted.

Signed this 28 day of September, 1988.

/s/ Robert B. Maloney
ROBERT B. MALONEY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-87-2989-T

THOMAS M. GAUBERT, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

This action came on for trial before the Court on Defendant's Motion to Dismiss, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that Plaintiff's complaint be dismissed.

Signed this 28 day of September, 1988.

/s/ Robert B. Maloney
ROBERT B. MALONEY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1923

D.C. Docket No. CA3-87-2989-T

THOMAS M. GAUBERT, PLAINTIFF-APPELLANT

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Texas

---

Before GEE, GARZA, and JONES, Circuit Judges.

[Entered Oct. 17, 1989]

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court. IT IS FURTHER ORDERED that

Gaubert's claim for the lost value of his shares is dismissed for lack of standing, and his claim for $25 million in lost property is remanded for further consideration.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

October 17, 1989

ISSUED AS MANDATE: Jan. 16, 1990

OP-JDT-11

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1923

THOMAS M. GAUBERT, PLAINTIFF-APPELLANT

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion October 17, 5 Cir., 1989, —— F.2d ——)
(January 5, 1990)

Before GEE, GARZA, and JONES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
THOMAS GIBBS GEE
United States Circuit Judge

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No. 89-1793 (2)

In the Supreme Court of the United States

October Term, 1989

United States of America, *Petitioner*

v.

Thomas M. Gaubert, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Government's petition presents the following issues:

1. Whether this Court should grant certiorari to review an interlocutory order of the Fifth Circuit that remands this case for further proceedings in which the entire suit could be dismissed on grounds not resolved in the interlocutory order.

2. Whether federal regulators of thrift institutions are absolutely immune from tort liability under the "discretionary function" exception to the Federal Tort Claims Act for any and all negligent actions arising out of a regulatory program, including those taken in the day-to-day management of a thrift and which do not call for the exercise of public policy discretion.

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No. 89-1793

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v.

Thomas M. Gaubert, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Thomas M. Gaubert respectfully requests that this Court deny the petition of the United States seeking a writ of certiorari. The Fifth Circuit's decision is an interlocutory order that dismisses one of Gaubert's two claims for lack of standing and remands the other with specific instructions for the district court to resolve an additional standing question which might dispose of the remainder of the case. The government seeks review of what, at this juncture, amounts to a *dictum* discussion by the Fifth Circuit of the "discretionary function" exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C.

Sec. 2680(a). As such, the petition is premature and asks this Court to render a potentially advisory opinion.

Although the government casts its petition for a writ of certiorari in terms that might be recognized under this Court's rules and precedents -- a conflict among the circuits, a decision contrary to this Court's rulings, a substantial and unsettled question of law -- these are no more than labels pinned on the government's attempt to seek review of an interlocutory discussion which it believes reaches factually infirm conclusions in a unique and complex case.

COUNTER-STATEMENT OF THE CASE

The government's statement of the case attempts to portray the Fifth Circuit's interlocutory order as a final judgment ripe for this Court's review. To the contrary, the Fifth Circuit dismissed one claim for lack of standing and remanded the other for a determination as to whether Gaubert has standing to bring it. Depending on how the further district court proceedings unfold, the Fifth Circuit's entire interlocutory discussion of the discretionary function exception may remain *dictum*.

The government's statement also omits material facts and creates the impression that this case is no different from the now common situation in which federal regulators supervise a failing thrift. This is clearly not the case: the original complaint (and the remaining claim on remand) alleges that federal regulators negligently conducted the *day-to-day management* of Gaubert's then healthy savings and loan. Additionally, the government's statement glosses over the Fifth Circuit's interlocutory observation that once federal regulators assume the management of a thrift's assets, they must use due care. Finally, the government's

statement refers to matters not alleged in the complaint and not part of the record before this Court.[1]

I. Factual Background

This case was before the Fifth Circuit on appeal from the district court's order dismissing Gaubert's amended complaint. Accordingly, this Court -- as the ones below -- must accept the facts alleged as true. *Gibbs v. Buck*, 307 U.S. 66 (1939).

A. Healthy Condition Of Thrift Before FHLBB Actions

In 1983, Gaubert acquired what became Independent American Savings Association ("IASA"). Amended

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[1] Throughout its statement of facts, the government cites to various materials outside the complaint, including the administrative record before the agencies at the time the regulators placed IASA in receivership. Neither the district court nor the Fifth Circuit relied on or referred to these materials. Moreover, the government often cites to only parts of these materials without including them in the record for the Court to review.

The government justifies use of these extraneous materials on the ground that they are "background materials" "challeng[ing] the substance of the jurisdictional allegations." *Petition for a Writ of Certiorari* ("Pet.") at 5 n.3 (*quoting* 5 C.Wright & A.Miller, *Federal Practice and Procedure* Sec. 1350, at 549 (1969)). Contrary to this explanation, it is obvious that the government really is using its own record material to challenge numerous factual allegations in the complaint despite this case being at the pleadings stage. For example, the government contests the complaint's assertion that the "neutralization agreement" in this case was unprecedented -- a matter obviously irrelevant to subject matter jurisdiction. The fact that the government finds itself compelled to dispute Gaubert's factual allegations in an effort to persuade this Court to take this case at the pleading stage confirms that a writ of certiorari is premature until the true facts are established in the proceedings below.

Complaint ("Compl.") at 6.[2] Federal and state regulators conducted independent audits and examinations which confirmed that, through the end of 1984, IASA's assets and net worth grew steadily and the thrift was financially sound. *Id.* at 8. Specifically, in December 1984, when Gaubert left the thrift, IASA had reported, without comment or dissent from the federal regulators, a net worth of at least $54 million. As late as 1985, before the regulators acquired control of its management, the thrift was financially sound and experiencing healthy growth. *Id.* at 9.

B. Investex Merger And The "Neutralization" Agreements

In 1984, the Federal Home Loan Bank Board ("FHLBB") and Federal Savings and Loan Insurance Corporation ("FSLIC") officials were looking for a merger candidate for Investex Savings, a failing Texas thrift. *Id.* at 16. During negotiations with Gaubert to acquire Investex, these officials became aware of questions concerning Gaubert's role as a borrower at an Iowa thrift. *Id.* at 12. Rather than scuttle the Investex transaction, the regulators pressured Gaubert to sign an unprecedented and never-again used "neutralization agreement." *Id.* at 13. Under the agreement, the Investex merger would proceed and Gaubert would temporarily remove himself from IASA while the FHLBB investigated the Iowa loan. *Id.* at 12. In addition, as part of the merger, Gaubert would contribute capital to IASA in the form of $25 million in personal assets and would guarantee IASA's net worth even though he was prevented from managing its operations. *Id.* at 14, 17. Contrary to the government's assertions first made in its petition, see note 1, *supra*, federal regulators have never

[2] All numbers cited with the Amended Complaint refer to paragraphs.

before -- nor have they since -- required anyone forced to relinquish management to enter into a net worth guarantee. *Id.* at 35. In December 1985, when the investigation of the Iowa loan did not proceed as planned, Gaubert negotiated and signed another agreement to permanently leave IASA and the industry. At the time, IASA was still a healthy thrift with a positive net worth. *Id.* at 35.

C. FHLBB Acquires Control Of IASA Management

Only after the regulators secured Gaubert's December 1985 agreement did they advise him of their desire to take over the management of IASA. Rather than exercising their formal regulatory powers -- issuing a cease and desist order, appointing a conservator for IASA, or imposing a receivership -- the regulators again utilized unprecedented procedures. *Id.* at 23. Through threats and pressure,[3] the regulators forced IASA's duly-elected directors and properly-appointed officers to resign and replaced them with their own hand-picked directors and officers. IASA's new chief executive officer came from the board of the Federal Home Loan Bank of Dallas ("FHLB-Dallas") and its new chief operating officer from one of the offices in the FHLB-D itself. *Id.* at 28. Neither had any experience managing a thrift. *Id.* at 31.

The degree of the regulators' involvement at IASA deepened to the point that they took part in IASA's day-to-day, technical and business management, including: negotiation of the new officer's salary and employment conditions; mediation of salary disputes; selection of financial and other consultants; conversion of IASA from a

[3] The Fifth Circuit observed that "the government euphemistically refers to this ability to pressure S & Ls as 'jawboning.'" *Pet.* at 3a.

state- to a federally-chartered thrift; placement of one of IASA's subsidiaries in bankruptcy; first prohibition and then authorization for IASA to initiate certain litigation; direct participation in decision-making at IASA board meetings; and prevention of state regulatory assistance to IASA. *Id.* at 33, 34. It was this involvement that the Fifth Circuit observed would be outside the discretionary function exception. *Pet.* at 14a.

After being at the helm of IASA for six months, the FHLB-D appointed management announced that IASA's net worth dropped from a positive $54 million to a negative net worth of over $400 million. *Id.* at 36.

II. Proceedings Below

A. District Court. In April 1988, Gaubert brought this tort action, asserting causes of action based on: (1) the regulators' negligent selection of IASA's officers and directors[4] and (2) the regulators' negligent day-to-day management of IASA. As to both claims, Gaubert alleged damages of $100 million -- $75 million for the lost value of his IASA shares and $25 million for loss of the additional capital he contributed to IASA under the guarantee agreement. The government moved to dismiss, arguing first that Gaubert lacked standing "because the alleged causes of action are owned by FSLIC/corporate" and second that Gaubert's claims fell within the "discretionary function" exception and were barred by sovereign immunity. *March 17, 1988 Motion to Dismiss* at 21, 25.

[4] In particular, Gaubert alleged that the federal agencies' negligent actions in forcing him to sign the neutralization agreement, engineering the Investex merger, compelling the resignation of IASA's directors, and handpicking new directors caused IASA's financial ruin.

On September 28, 1988, the district court granted the Government's motion. Electing not to address the government's standing argument, the court held that the actions alleged were encompassed by the discretionary function exception. The court reasoned that because a decision to place IASA in receivership would have fallen within the exception, so too did the federal agencies' decision *not* to place IASA in receivership. *Pet.* at 24a. From this -- without citation to *any* authority -- the court concluded that the federal agencies' negligent day-to-day management of IASA, then a healthy thrift, was "an extension of the Agencies' discretion not to place IASA in receivership in 1984."[5] *Id.* at 25a.

B. Court of Appeals. Contrary to the approach of the district court, the Fifth Circuit disposed of the case on standing grounds. The Fifth Circuit held that Gaubert lacked individual standing to bring suit on his first claim for the diminution in value of IASA shares:

> Gaubert suffered no injury as a result of the neutralization agreement that was not suffered by all of the other IASA shareholders -- the loss of the value of their shares. This being the case, Texas law does not permit Gaubert an individual cause of action.

[5] The court's reasoning flatly contradicts this Court's holding in *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955), that, although the decision to assume operation of a lighthouse fell within the discretionary function exception, the negligent operation of the facility did not. The court's reasoning also failed to account for the fact that if the government had placed IASA in receivership, it would have been liable for the negligent management of IASA's assets. See *FDIC v. Hartford Insurance Co.*, 692 F.Supp. 866 (N.D.Ill. 1988), *vacated on other grounds*, 877 F.2d 590 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 865 (1990).

Pet. at 19a. Accordingly, the court affirmed the dismissal of Gaubert's $75 million stock claim.

The Fifth Circuit remanded Gaubert's $25 million claim -- based on the guarantee agreement -- with instructions that the district court determine Gaubert's standing to bring that claim. The court held:

> Gaubert may have a personal cause of action against FHLBB, FHLB-Dallas, and FSLIC for causing the deterioration of IASA resulting in the loss of his property * * * * Unfortunately, we do not have sufficient information in the record to allow us to pass on whether Gaubert has a cause of action in this regard, as it may depend on whether there was an express or implied promise as part of the guarantee that the federal officials would not negligently cause the deterioration of the corporation.

Pet. at 20a. The Fifth Circuit "therefore remand[ed] Gaubert's action for loss of property valued at $25 million to the district court to determine whether a valid claim is presented." *Id.*[6] The government unsuccessfully sought rehearing, no judge requesting that the court be polled. *Pet.* at 30a.

Going beyond the Fifth Circuit's holding on standing is its thorough discussion of this Court's "discretionary

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[6] While the Fifth Circuit discussed the "discretionary function" exception first and standing second, its holding is clear. Both the introduction to the Fifth Circuit's opinion and the conclusion make clear that "Gaubert's claim for the lost value of his shares is DISMISSED for lack of standing, and his claim for $25 million in lost property is REMANDED for further consideration." *Pet.* at 20a.

function" exception decisions. Rather than ignoring *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984), as the government now contends, the Fifth Circuit acknowledged that the central policy behind the exception is "Congress['s] wish[] to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Pet. at 8a-9a. Citing *Berkovitz v. U.S.*, 486 U.S. 531, 108 S.Ct. 1954 (1988), the court then discussed the "two distinct strands of conduct to which the discretionary function exception does not apply." *Id.* at 11a.

"[F]irst are cases where the official is acting pursuant to statute, and therefore has no real discretion, as her actions are pre-ordained by Congress." *Id.* at 11a-12a. Again citing *Berkovitz, supra*, 108 S. Ct. at 1963, the court noted that the fact that "officials [do] not have regulations telling them at every turn, how to accomplish their goals * * * does not automatically render their decisions discretionary and immune from FTCA suits." Rather, "*[o]nly policy oriented decisions enjoy such immunity.*" *Id.* at 12a (emphasis added) (citations and footnotes omitted). Hence, "the second type of conduct not encompassed by the discretionary function exception are those actions which are taken outside of the strictures of statutory or regulatory mandates," and which are not "policy oriented." *Id.*

The Fifth Circuit then discussed the *Varig/Berkovitz* distinction between non-mandatory actions that are policy-oriented and those that are not in the context of "the factual allegations of Gaubert's complaint to determine at which point the federal officials lost their Sec. 2680(a) immunity." *Id.* at 13a. Carefully weighing the specific facts, it observed that some allegations fell and others survived:

> [T]he decision to merge IASA with Investex and seek a neutralization agreement from Gaubert was a policy oriented decision protected by [sec.] 2680(a). Similarly, the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception.

Pet. at 14a (citations omitted). The court observed further, however, that the federal agencies' actions lost their "policy oriented" character "and thus lost the protection of [sec.] 2680(a)[:]"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in [paras.] 33-43 of the Amended Complaint.

Id. Accordingly, the Fifth Circuit stated that paras. 33-43 of the amended complaint -- those alleging that the agencies assumed IASA's day-to-day management -- would be actionable if Gaubert establishes standing to bring a claim.

REASONS FOR DENYING THE WRIT

I. Supreme Court Review Of The Fifth Circuit's Interlocutory Order Is Premature.

By holding that Gaubert had no individual standing to redress the devaluation of IASA's stock, the Fifth Circuit rendered that portion of its discretionary function discussion relating to the $75 million claim *dictum*. Further, by

remanding the issue of Gaubert's standing to assert a $25 million claim under the guarantee agreement for further fact development, the Fifth Circuit undercut whether any of that discussion will mature into an actual holding.[7] If the district court determines that Gaubert lacks standing to bring his remaining claim, the case is over. Accordingly, the Fifth Circuit's interlocutory discussion of the discretionary function exception will be ripe for review only if the district court resolves the outstanding jurisdictional issues in Gaubert's favor. At this juncture, certiorari is simply premature.

The Government seeks to portray the Fifth Circuit's decision as "interlocutory [only] in that it remands to the district court for further proceedings." *Pet.* at 23 n.14. The Government also contends that the decision otherwise "conclusively resolves the critical issue of the application of the discretionary function exception in this case, by holding that the government's actions do not fit within that exception as a matter of law." *Id.* By specifically instructing the district court to resolve threshold jurisdictional issues that may moot the entire case, however,

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[7] The government's protestations that the Fifth Circuit's opinion creates important precedent requiring immediate Court review contradicts its earlier position. Seeking a rehearing below, the government seemed to agree that the Fifth Circuit's discussion might only be *dicta* depending on what happened on remand:

> It is unclear whether the opinion is stating that plaintiff may have a tort or contract claim * * * for $25 million based upon his guarantee agreement, or whether the Panel is suggesting that plaintiff may have a contract claim directly against the Bank Board and FSLIC * * * [I]f the opinion was contemplating a possible contract action against the Bank Board or FSLIC, that part of the opinion which construes the FTCA's discretionary function exception should be deleted because it is *dicta* only.

Pet. for Rehearing at 14.

the Fifth Circuit's order is "interlocutory" at a far more fundamental level than the government would have this Court imagine.[8] Because it is still uncertain whether, and on what factual and legal bases, Gaubert's remaining claim will survive on remand and whether the district court will vitalize the Fifth Circuit's discretionary function exception discussion, this case falls squarely within "the Court's normal practice of denying interlocutory review." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissent); see also *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (lack of finality in judgment below may "of itself alone" constitute "sufficient ground for the denial of the application" except in extraordinary cases).[9]

II. The Negligent Day-To-Day Management Of A Thrift Falls Outside The Discretionary Function Exception.

Even apart from its interlocutory nature, the Fifth Circuit's discussion of the discretionary function exception does not meet this Court's standards for certiorari review because it correctly considered this Court's well-established principles in the context of the federal regulators' negligent day-to-day management of IASA.

The discretionary function exception "'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect

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[8] Indeed, its petition relegates mention of the Fifth Circuit's remand order to a casual reference in two footnotes of its twenty-three pages. *Id.* at 11 n.7 & 23 n.14.

[9] This Court has long practiced restraint in its exercise of certiorari jurisdiction. "[T]his court should not issue a writ of certiorari to review the decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893).

certain governmental activities from exposure to suit by private individuals.'" *Varig, supra*, 467 U.S. at 808. In its most recent pronouncement, this Court has made clear that such a boundary can -- and must -- be drawn in *every* area of government regulation. "In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument * * * that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies." *Berkovitz, supra*, 108 S.Ct. at 1959-60.

In every case, then, a court must -- as the Fifth Circuit did here -- carefully analyze a complaint and determine whether, and which, actions fall on either side of the boundary. In conducting such an analysis "it is the nature of the conduct rather than the status of the actor that governs whether the discretionary function exception applies." *Varig, supra*, 467 U.S. at 813. As the Fifth Circuit acknowledged, there are two types of conduct -- that mandated by statute or regulation leaving no discretion and non-mandatory conduct that involves judgment other than public policy -- that fall outside the exception. *Pet.* at 11a-12a; see *Berkovitz, supra*, 108 S.Ct. at 1959, 1964.

In its discussion, the Fifth Circuit carefully considered these principles in the context of the facts presented. Federal statutes and regulations did not mandate how the federal agencies should manage IASA's day-to-day operations. Instead, the federal regulators were required to exercise an element of judgment. An element of judgment, however, does not automatically bring an action within the pale of the discretionary function exception. Instead, the judgment involved must be based on "social, economic, and political" policy considerations -- *i.e.*, the "governmental actions and decisions [must] be based on considerations of *public policy*." *Berkovitz, supra*, 108 S.Ct. 1959 (emphasis added). That is, "[t]he

[discretionary function] exception properly construed, * * * protects only governmental actions and decisions *based on considerations of public policy*." *Id.* (emphasis added).

The Fifth Circuit's discussion draws a principled distinction between non-mandatory actions that involved protected policy judgment (*e.g.*, the decision to merge Investex) and those that did not (*e.g.*, selection of consultants for routine loan evaluations). Although the federal regulators' decision to acquire control of IASA's day-to-day management might well have involved public policy considerations protected under the discretionary function exception, the actual management of IASA did not. The element of judgment involved in the type of day-to-day management alleged to have occurred at the then healthy IASA is qualitatively different from the "social, economic, and political policy" necessary to exempt an action from tort liability. Prudent management of a thrift requires business expertise and a combination of many technical skills, not governmental policy considerations. For example, decisions to manage an institution's assets, issue or call loans, raise or lower salaries, hire or dismiss consultants, and initiate a lawsuit involve technical and business expertise and do not implicate the legislative quality of protected actions.[10].

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[10] In footnote 4 of its opinion, the Fifth Circuit quoted the following passage from Judge Brown's concurrence in *Collins v. United States*, 783 F.2d 1225, 1233-34 (5th Cir. 1986):

> Every act of a rational being involves some choices -- speed up or slow down, turn right or left, put helm port or starboard, go full astern or full ahead, tighten brakes or replace them, glide in or circle, use general anesthetic or local, use a human heart or a JARVIK 7. It is plain that the discretionary function exception of [sec.] 2680(a) must be applied with restraint if the Tort Claims Act is

(continued...)

Nor would it save the regulators' actions by arguing that they directed IASA's management based on public policy. In observing that *Indian Towing* "illuminates the scope of the discretionary function exception," this Court plainly stated that "maintain[ing] the lighthouse in good condition * * * did not involve any permissible exercise of policy judgment." *Berkovitz, supra*, 108 S.Ct. at 1959 n.3. Public policy considerations were no more involved in the management activities alleged at IASA than they were in operating a lighthouse or a flight tower."[11] *Indian Towing, supra*, 350 U.S. at 67-8 (lighthouse); *United States v. Union Trust Co.*, 350 U.S. 907 (1955) (flight controllers) (affirming decision that "discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently").

The government's petition mischaracterizes the Fifth Circuit's interlocutory discussion of the discretionary function exception. According to the government, the Fifth Circuit concluded that "any activity that is 'operational in nature' *necessarily* falls outside the scope of the [discretionary function] exception." *Pet.* at 11. While the Fifth Circuit occasionally used the shorthand phrase "operational" to describe the actions alleged in paras. 33-43 of Gaubert's amended complaint, it did not state that

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[10] (...continued)
to achieve the dual purpose which motivated its enactment. *Pet.* at 12a.

[11] The government contends that the Fifth Circuit's discussion of the discretionary function exception ignores *Varig*. *Pet.* at 15. To the contrary, the Fifth Circuit's discussion -- as explained above -- follows *Varig* fully. The proper analogy to *Varig* on the facts presented would be if the FAA had decided to operate an airplane (an immune policy decision) and then placed inexperienced pilots in the cockpit, gave them faulty maps and charts, and radioed them to fly a certain course, all of which caused the plane to crash (an actionable tort).

any actions conceivably characterized as "operational" are therefore actionable under the FTCA. To the contrary, the Fifth Circuit -- following this Court's analysis in *Berkovitz* -- first explored whether the alleged actions "'involve[d] any permissible exercise of policy judgment.'" *Pet.* at 11a. Only if the action was not "policy oriented" or did not permissibly involve policy judgment, did the court observe that it would fall outside the discretionary function exception. Over two-thirds of Gaubert's allegations -- many of which the compiaint also characterized as "operational" -- failed to pass the Fifth Circuit's exacting scrutiny. It is simply inaccurate for the government to state that the Fifth Circuit's interlocutory discussion of the exception "turns on" an "artificial distinction[] as that between * * * 'policy' and 'operational' activities." [12] *Pet.* at 12.

Distilled to its essence, the government's petition asks this Court to grant absolute immunity to federal officials involved in the thrift industry, even after those officials have assumed day-to-day management of a healthy thrift. Conspicuously absent from the government's petition is the articulation of any standard defining what FTCA actions would ever be actionable in a savings and loan context. Apparently, once in the regulatory framework, all actions would fit the discretionary function exception. It is this position -- rather than the Fifth Circuit's discussion -- which flatly contradicts this Court's precedent. *Berkovitz, supra*, 108 S.Ct. at 1959-60 ("[W]e intend specifically to reject the Government's argument * * * that the exception precludes liability for any and all acts arising out of [a] regulatory program[].")

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[12] While contending that its argument is not merely semantics, *Pet.* at 19, the government does no more than substitute its chosen words, "nature of the discretion exercised," for those used by the Fifth Circuit. This type of wordsmanship is not the proper basis for certiorari of an interlocutory order at the pleadings stage.

The government could not have made its claim to absolute immunity clearer than in its petition for rehearing to the Fifth Circuit:

> [t]here simply is no such thing in the thrift regulatory context as a decision to regulate on the one hand and a decision to take over the management of a thrift on the other. Rather, there is a continuing series of discretionary decisions many of which profoundly affect the management and direction of the institution. * * * *In this area of regulation, the mandate to regulate is equal to the power to control and influence the affairs of the association regulated* * * *.*

Pet. for Rehearing at 29 (emphasis added). Elsewhere the government stated: "The discretion to regulate in this context is the discretion to do so thoroughly, *even to the point of controlling and influencing the day-to-day operation of an association.*" *Id.* at 36 n.24 (emphasis added).

Granting federal thrift regulators absolute immunity elevates them to a status more protected than that of other agencies[13] and grants them greater protection in the exercise of their informal powers than they would have if they formally exercised their statutory authority. See *Hartford Insurance Co., supra*, 692 F. Supp. at 687-9 (government liable for FDIC receiver's negligent management of thrift's assets). Aside from the inherent

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[13] See, *e.g.*, *Berkovitz, supra*, 108 S. Ct. at 1963-64 (remanded for determination whether negligent release of vaccine involved permissible public policy judgment or technical expertise); *Indian Towing, supra*, 350 U.S. at 67-8 (lighthouse); *Rayonier Corp. v. U.S.*, 352 U.S. 315 (1957) (firefighters); *United States v. Union Trust Co.*, 350 U.S. 907 (1955) (flight controllers).

inequity of the government's position, this point illustrates that the government's claim that a principled distinction cannot be drawn between public policy judgment and business judgment is untenable.

III. The Government's Petition Does Not Present A Substantial Or Unsettled Question Warranting Review.

Even ignoring the fact that the Fifth Circuit's discussion of the discretionary function exception is interlocutory and *dictum*, the government's petition does not present a substantial or unsettled question warranting review.

The Fifth Circuit's discussion would merely permit Gaubert to attempt to prove those allegations that charge the government with negligence in its day-to-day management of his thrift.[14] Those allegations set forth factual circumstances that reflect unprecedented actions taken by federal regulators. Such circumstances have not occurred and will not occur again.[15] Moreover, as with any other of the hundreds of cases decided under the discretionary function exception, the Fifth Circuit's discussion is highly fact specific and, aside from general principles applied, would be of extremely limited precedential value.

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[14] Again, this case is only at the initial pleadings stage. On remand, Gaubert will also have to establish causation, damages, and the other elements of a tort.

[15] The government raises the recent passage of FIRREA, the new banking law, somehow to bolster its argument. *Pet.* at 20. In reality, the new procedures of the law make it highly unlikely that the events at IASA will ever occur again.

The government incorrectly raises the specter that the Fifth Circuit's interlocutory discussion will "hobble and confine" federal efforts to address problems in the thrift industry."[16] First, the government assumes that Gaubert's remaining claim will survive the remaining jurisdictional obstacles awaiting him on the remand. Second, the Fifth Circuit's discussion affords federal officials virtually unbounded latitude in regulating thrift institutions. After carefully examining each allegation of Gaubert's complaint, the court observed that the vast majority fell within the discretionary function exception and were non-actionable. For example, the government will never have to answer for the folly of forcing a merger between Gaubert's then healthy thrift and a larger, failing thrift. Accordingly, the government's contention that the Fifth Circuit's discussion unduly limits regulatory discretion is without substance.

IV. The Fifth Circuit's Interlocutory Discussion Does Not Conflict With A Decision Of Any Other Circuit.

The government does not -- and cannot -- contend that the Fifth Circuit's discussion conflicts with a decision of any other circuit. Given the interlocutory nature of the case and the fact that the discussion of the discretionary function exception is *dictum*, it is too early to speak of a

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[16] In its petition, the Government raises the well-worn threat that the Fifth Circuit's interlocutory discussion of the discretionary function exception will open the floodgates to litigation. In the over seven months since the Fifth Circuit issued its interlocutory ruling, only one federal reported decision cited the discussion in a reported opinion. *Industrial Risk Insurers Assoc. v. New Orleans Public Service, Inc.*, __ F. Supp. __ (E.D.La. 1990) (1990 WL 36140). In that case, the court -- interpreting a state law provision analogous to the discretionary function exception -- cited the *Gaubert* discussion for the unremarkable proposition that "to be entitled to immunity, the decision must involve the weighing of economic, political and social policy concerns." *Id.* The court could just as easily have cited *Berkovitz*.

"conflict." A disagreement -- if such exists -- between an express holding in one case and interlocutory *dictum* in another does not present a conflict worthy of certiorari. Second, the government contends only that certain circuits "*appear* to reject the operational limitation," while others -- including the Fifth Circuit -- "*appear* to embrace it." *Pet.* at 18-19 (emphasis added). In fact, several of the cases cited have already been before this Court on a petition for certiorari which this Court denied.

The government's petition does not identify even apparent "conflicts." Indeed, fairly viewed, the Fifth Circuit's opinions, many heard by the same judges as here, tend to be more favorable to the government than those of other circuits.[17] Moreover, the government's criticism flatly contradicts its own statements about the Fifth Circuit's expertise in addressing the discretionary function exception. The government conceded below that the "Fifth Circuit has addressed the Discretionary Function Exception on several occasions since the Supreme Court's decision in *Varig*. In each of these cases, the Fifth Circuit followed the dictates of *Dalehite* and *Varig* and in all but one held that the district court lacked subject matter jurisdiction because of

[17] See, *e.g.*, *Lively v. United States*, 870 F.2d 296 (5th Cir. 1989) (no liability for failure to warn stevedores of asbestos dangers); (Gee, J.); *B&F Trawlers, Inc. v. United States*, 841 F.2d 626 (5th Cir. 1988) (no liability for negligent transportation of drug-running vessels) (Jones, J.); *Wysinger v. United States*, 784 F.2d 1252 (5th Cir. 1986) (no liability for negligent decision not to employ lifeguard); *Lindsey v. United States*, 778 F.2d 1143 (5th Cir. 1985) (no liability for negligent denial of patent application); *Jet Industries, Inc. v. U.S.*, 777 F.2d 303 (5th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986) (no liability for negligent supervision of probationer); *Ford v. American Motors*, 770 F.2d 465 (5th Cir. 1985) (no liability for sale of used jeeps without safety warnings).

the Discretionary Function Exception." *March 17, 1988 Motion to Dismiss* at 28-9 (footnotes omitted)."[18]

The hundreds of decisions under the discretionary function exception are highly fact-specific and, as such, are rarely -- if ever -- dispositive of a later case. These decisions reflect the normal course of common-law development. Often both sides can refer to the same decision for support, each emphasizing the facts most similar to its own case. If the Fifth Circuit's discussion here were to become a holding, it would be no different. Even if there are in this case the discords about which the government complains, they may not remain after the facts are developed on remand. The government's request that this Court harmonize the Fifth Circuit's interlocutory discussion with other highly fact-specific cases is premature.

[18] Since 1984 alone, the Fifth Circuit has addressed the discretionary function exception in dozens of decisions. Since 1980, the members of the *Gaubert* panel had individually authored a total of seven opinions on the topic.

CONCLUSION

For the foregoing reasons, this Court should deny the government's petition for a writ of certiorari.

Respectfully submitted,

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MAY 29, 1990

No. 89-1793

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondent argues that the Fifth Circuit's treatment of our discretionary function claim is dicta, because that court remanded the case for further proceedings. Br. in Opp. 1, 2, 10, 18, 19. That argument is frivolous.

In the district court, we moved to dismiss respondent's complaint on the ground that his tort claims are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). The district court granted our motion on that ground, and dismissed respondent's complaint in its entirety. If the court of appeals had agreed with the district

court, it would have affirmed. But it reversed (in part) *because* it disagreed on the discretionary function issue, and then remanded the case for further proceedings. Thus, the court of appeals' judgment of reversal rested squarely on its conclusion with respect to the discretionary function exception.

2. Respondent also argues that the decision below is interlocutory, since the Fifth Circuit remanded the case for further proceedings. Br. in Opp. 1, 2, 10-12, 15, 18, 19, 20, 21. That is true, but immaterial.

The decision below resolves the question whether, as a matter of law, the action is barred by the discretionary function exception. Moreover, that question, as the courts below recognized, Pet. App. 5a-6a, is jurisdictional, since the exception is a limitation on the federal government's waiver of sovereign immunity. See generally *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941) (where action depends upon a waiver of the sovereign immunity of the United States, the statutory terms and conditions of the waiver "define [a] court's jurisdiction to entertain the suit"). By contrast, the issue that the Fifth Circuit directed the district court to resolve on remand—*i.e.*, whether respondent has a cause of action under Texas law for the lost personal property that he posted as part of the neutralization agreement, Pet. App. 19a-20a—is not a jurisdictional question. Although the court of appeals began by characterizing this issue as one of "standing," *id.* at 14a, its analysis of the issue being remanded focused on whether there had been an undertaking to use due care, and its conclusion was that it could not "pass on whether [respondent] has *a cause of action* in this regard." *Id.* at 19a (emphasis added). And there can be no doubt that the question that the court of

appeals did decide conclusively—the applicability of the discretionary function exception—is both jurisdictional and important. Accordingly, as one authority has explained, where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986). See *id.* at 225-226 and cases cited therein.

3. Respondent maintains that the Fifth Circuit did not exclude all "operational" actions from the discretionary function exception—that the Fifth Circuit simply excluded the government's activities in this case. Br. in Opp. 15-16. The Fifth Circuit's opinion, however, belies that claim. According to that court, respondent's argument that "the actions of the FHLBB and FHLB-Dallas lost the protection of the discretionary function exception when they began to assume operational, day-to-day control over IASA" was a "well-taken point." Pet. App. 6a. The court said that *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), "establish[ed] the principled distinction between policy decisions and operational actions," a "distinction" that "still retains its force today *and is dispositive of this case*." Pet. App. 7a (emphasis added). The court concluded that "[a]ny doubts about the sustained viability of th[e] ["discretionary function/operational activity"] distinction were put to rest" by footnote 3 in *Berkovitz* v. *United States*, 486 U.S. 531 (1988). Pet. App. 11a. Thus, the court concluded, any activity that is "operational in nature" necessarily falls outside the scope of the exception. *Id.* at 12a. And the Fifth Circuit summarized that "the FHLBB and FHLB-Dallas officials

were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in *Indian Towing*." *Id.* at 12a-13a.

In sum, the Fifth Circuit made it quite clear that it was adopting a rule of law that "operational" activities do not fit within the discretionary function exception, a rule that was not limited to the facts of this case. The decision on this important question is therefore an appropriate one for this Court to review.

4. Respondent argues that the decision below rests on the allegedly peculiar facts of this case and does not conflict with the decisions cited in our petition. Br. in Opp. 19-21. Respondent does not (and could not) deny that other circuits have rejected an "operational" limitation on the discretionary function exception. See Pet. 18-19. The Ninth Circuit did so expressly in *Begay* v. *United States*, 768 F.2d 1059, 1062-1063 n.2 (1985) (citations omitted), explaining that:

> In the past, we have used the planning level/operational level dichotomy when analyzing the application of the discretionary function exception. * * * In recognition of the problems that surround the application of the discretionary function exception, and in light of the Supreme Court's recent decision in [*United States* v. *Varig Airlines*, 467 U.S. 797 (1984)], we believe that the proper approach to determining when the exception applies is for the court to look to the nature of the conduct in question.

Respondent's argument that the Fifth Circuit did not endorse such an "operational" limitation in this case rests on the same flaw as respondent's prior argument. As we have explained, the Fifth Circuit squarely held that the actions of the federal officials

challenged in this case did not fit within the discretionary function exception because those actions were operational in nature. The Fifth Circuit thereby revived the operational limitation on the discretionary function exception that this Court rejected in the *Varig* case and that other circuits have rejected since then. Accordingly, there is a clear conflict among the circuits on the proper application of that exception, a conflict that only this Court can resolve.

* * * *

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

JUNE 1990

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* The Solicitor General is disqualified in this case.

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No. 89-1793 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED MAY 16, 1990
CERTIORARI GRANTED JUNE 18, 1990

In the Supreme Court of the United States

OCTOBER TERM, 1990

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JOINT APPENDIX

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* The opinions and judgments of the district court and of the court of appeals and the order of the court of appeals denying rehearing are printed in the appendix to the petition for a writ of certiorari and have not been reproduced herein.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CA3-87-2989-T

THOMAS M. GAUBERT

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1987		
Dec 17	1	COMPLAINT SEEKING DAMAGES UNDER FEDERAL TORT CLAIMS ACT
		* * * * *
1988		
Mar. 18	10	MOTION OF THE USA TO DISMISS THE COMPLAINT
Mar. 18	11	MEMORANDUM IN SUPPORT OF MOTION OF THE USA TO DISMISS THE COMPLAINT
		RECEIVED EXHIBITS TO MOTION OF THE USA TO DISMISS THE COMPLAINTS (under separate cover)

DATE	NR	PROCEEDINGS
Mar. 22	12	AMENDED MOTION TO THE USA TO DISMISS[.] NO EXHIBITS RECEIVED AS INDICATED ON MOTION
Apr. 11	13	PLTF'S OPPOSITION TO MOTION TO DISMISS
Apr. 11	14	AMENDED COMPLAINT SEEKING DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT
May 10	15	RENEWED MOTION OF THE USA TO DISMISS
May 10	16	MEMORANDUM IN SUPPORT OF THE RENEWED MOTION OF THE USA TO DISMISS & IN REPLY TO PLTF'S OPPOSITION TO ITS ORIGINAL MOTION TO DISMISS
May 23	17	PLAINTIFF'S OPPOSITION TO DEFENDANT'S RENEWED MOTION TO DISMISS
		* * * * *
Sep. 28	22	ORDER GRANTING MTN TO DISM . . . Court is of the opinion that the actions of which pltf complains fall w/i the discretionary function exception to the FTCA and therefore this court does not have subject matter jurisdiction over his claims. Ordered that deft's motion to dism is granted. cys to cnsl/dktd 9/30/88

DATE	NR	PROCEEDINGS
Sep. 28	23	JUDGMENT . . . Action came for trial before court on deft's mtn to dism and issues having been duly tried and a decision having been duly rendered. Ordered that pltf's complt be dism. cys to cnsl/dktd 9/30/88
Oct. 13	24	MOTION TO ALTER AND AMEND THE JUDGMENT
Oct. 20	25	MEMORANDUM OF THE U.S. OF AMERICA IN OPPOSITION TO PLTFS MOTION TO ALTER AND AMEND JUDGMENT
Nov. 10	26	ORDER DENYING MOTION TO ALTER AND AMEND JUDGMENT . . . that Pltfs motion to alter and amend judgment is DENIED cpy cnsl 11/14-dkt 11/15
Nov. 16	27	NOTICE OF APPEAL from Judgment of September 28, 1988. cpy cnsl.
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1923

THOMAS M. GAUBERT

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1988	
Nov. 18	Dup. Notice of Appeal and Clerk's Statement of Docket Entries
Dec. 1	Record on Appeal[,] No. of Vols. 2
	* * * * *
1989	
Jan. 10	Records Excerpts-Appellant
Jan. 10	Brief for Appellant
Feb. 10	Brief for Appellee
Feb. 28	Reply Brief for Appellant
	* * * * *
Jun. 8	Case Argued

DATE	PROCEEDINGS
Oct. 17	Opinion Rendered
	Flg. & Entg. Judgment
	Further, Gaubert's claim for the lost value of his shares is dismissed for lack of standing, and his claim for $25 million in lost property is remanded for further consideration
Oct. 27	Mot. for Ext.-Ext. to 11/30/89/ (Appellee)
Nov. 30	Petition for Rehearing-Appellee Reg.
Nov. 30	Petition for Rehearing-Appellee En Banc
1990	
Jan. 5	Order Denying Rehearing
Jan. 16	Jdgt. as Mdt. Issd. to Clerk
	Record on Appeal Retd. to Clerk 2 vols
Apr. 2	Order of S.C. Ext. to 5/7/90
May 3	Order of S.C. Ext to 5/17/90
May 25	Notice of Flg. of Cert. Pet. on 5/16/90

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-87-2989-T

THOMAS M. GAUBERT
1120 WESTMORELAND ROAD
DE SOTO, TEXAS 75115
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDED COMPLAINT SEEKING DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT

Introduction

Plaintiff THOMAS M. GAUBERT brings this action against the UNITED STATES OF AMERICA for damages for the loss of his property interest in Independent American Savings Association ("IASA") due to the assumption of the day-to-day management of IASA by the Federal Home Loan Bank Board ("Bank Board"), Federal Home Loan Bank of Dallas ("FHLB-Dallas") and Federal Savings and Loan Insurance Corporation ("FSLIC"), and the negligent discharge of that assumed duty. At all times relevant to this action, the persons directing the management of IASA or actually managing the day-to-day operations of IASA were federal agents acting within the scope of their authority. This negligent management led to appointment of FSLIC as receiver for IASA on May 20, 1987 and led ultimately to the seizure of Gaubert's property.

Parties

1. Plaintiff Thomas M. Gaubert was, during the period in question, the largest single shareholder of IASA. Until late 1984, plaintiff Gaubert was Chairman of the Board of IASA.

2. Plaintiff Gaubert is a resident of Dallas County, Texas.

3. Defendant United States is liable for damages caused by the Bank Board, a federal agency charged with supervising the FSLIC pursuant to 12 U.S.C. §§ 1437, 1464, 1724-30, and the Federal Home Loan Banks (including the FHLB-Dallas) pursuant to 12 U.S.C. §§ 1421-49.

Jurisdiction

4. This action arises under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq*. On May 20, 1987 an administrative tort claim was filed with the Bank Board on behalf of the plaintiff Thomas M. Gaubert; the Bank Board denied said claim by letter dated November 20, 1987.

Venue

5. Venue is proper in this district pursuant to 28 U.S.C. § 1402(b).

Facts

(Thomas M. Gaubert Acquires And Expands A Healthy Thrift)

6. In January 1983, Thomas M. Gaubert acquired controlling interest of Citizens Savings & Loan and caused that thrift's name to be changed to Independent American Savings Association. IASA was a Texas state-chartered

and federally-insured savings and loan association. Following that acquisition and until the time IASA was put into receivership on May 20, 1987, Gaubert was the largest shareholder of IASA.

7. From January 1983 through March 1986, IASA grew steadily while its financial health remained good. Financial statements issued during this period disclosed an upward trend in both assets and net worth. With the single exception of the last quarter of 1985, when a short-term surge in deposits forced IASA to exceed by a small margin the Bank Board/FSLIC growth standards, IASA's operations met all Bank Board/FSLIC net worth and growth requirements. The end-of-year surge in deposits in 1985 was attributable in large part to an $80 million unsecured loan which IASA took from FHLB-Dallas.

8. At the end of 1984, IASA was a profitable savings and loan association. In June 1984 and for the last quarter of 1984, independent audits and examinations by federal and state regulators indicated that IASA met all regulatory requirements, including those for net worth and proper management.

9. In September 1985, the Board of Directors of IASA filed reports with the FHLB-Dallas indicating IASA's net worth to be $54 million. The FHLB-Dallas did not object to, or seek any revision of, this net worth calculation at the time. In December 1985, IASA closed transactions on its belief that its net worth was approximately $74 million.

10. In or about March 1986, employees of IASA's independent auditor, Arthur Young and Company, indicated for the first time that some downward adjustment in net worth for the fiscal year ending September 1985 might be appropriate. Arthur Young and Company suggested an adjustment of approximately $18-20 million, leaving a positive net worth of approximately $35 million.

11. From the time he acquired Citizens Savings in 1983 until the fall of 1984, Gaubert served as chairman of the board of IASA.

(Federal Agencies Seek An Unprecedented "Neutralization Agreement" With Thomas M. Gaubert)

12. The Bank Board and the FHLB-Dallas began to take over the operations of IASA when, in the fall of 1984, they sought Gaubert's removal from IASA. As a result of an investigation into a 1983 loan concerning an *Iowa* savings and loan, officials of the Bank Board and the FHLB-Dallas requested that Gaubert temporarily remove himself from IASA in *Texas*.

13. The "voluntary, temporary" removal was unprecedented; it was outside the agency's supervisory authority, and it detoured around Gaubert's elementary procedural rights because the Bank Board did not bring formal charges, and present clear and convincing evidence, in order to secure Gaubert's removal from IASA.

14. As part of the procedure, officials at the Bank Board and FHLB-Dallas also required that Gaubert *personnally* guarantee that the net worth of IASA not fall below regulatory minimums. This too was unprecedented.

15. No other shareholder or officer or director of IASA was asked to (or did) sign any similar removal agreement, or any similar personal net worth guarantee.

(Federal Agencies Seek To Merge IASA With Investex)

16. At this same time, officials at the Bank Board and FHLB-Dallas were considering an application to merge IASA with another Texas savings and loan, Investex Savings, and to allow IASA to acquire branches from still another Texas financial institution, United Savings.

17. As part of this application, officials at the two federal agencies suggested that Gaubert contribute to the merger and acquisition transactions his personal interest in property at Poole Lake. Gaubert's interest in the property was valued at more than $25 million.

18. No other shareholder or officer or director of IASA was asked to (or did) contribute any personal interest in property to the merger and acquisition transactions.

19. Officials at the federal agencies assisted IASA in its merger with Investex Savings and acquisition of branch offices from United Savings by providing regulatory and financial advice on how to accomplish the transactions. They advised IASA that it had to grow sufficiently to absorb the losses of Investex. They even advised IASA on how it should present the transactions to its shareholders for approval. One FHLB-Dallas employee helped phrase proxy statements disclosing Gaubert's "voluntary" removal agreement.

(Federal Agencies Force Replacement of IASA's Management)

20. Despite reports of IASA's positive net worth (which were never challenged by the Bank Board or FHLB-Dallas), IASA's Board of Directors received word from one of its counsel in February or March 1986 that officials at the FHLB-Dallas planned to engineer the replacement of that IASA's management and Board of Directors.

21. The Board of Directors was told that the FHLB-Dallas would close IASA if it did not actively cooperate with this plan. The Board of Directors of IASA reasonably believed that FHLB-Dallas would carry out its threats.

22. The FHLB-Dallas also told the existing IASA Board of Directors that it (the agency) would, and it

undertook the effort to, search for and select for IASA high caliber people, with experience and national reputations in the field, to become the new Board of Directors and officers of IASA.

23. At this time, IASA was not under any supervisory agreement with the Bank Board or FHLB-Dallas; there was no federal regulatory consent agreement of any kind in effect; there were no cease and desist orders pending; and IASA was not under any state or federal conservatorship or receivership. Consequently, neither the Bank Board nor FHLB-Dallas had any immediate legal authority to demand any directorship or management changes at IASA and went beyond their normal regulatory role by participating in and becoming the *de facto* decision-makers for the operations of IASA.

24. Bank Board and FHLB-Dallas officials enlisted Gaubert's assistance in taking over the operations of IASA. In February 1986 Gaubert was still under the terms of his "temporary" removal agreement. Under those terms, Gaubert was not permitted to interfere or participate in the operations of the thrift. Despite these provisions, officials at the FHLB-Dallas called Gaubert and said they would "free him" from the removal agreement so Gaubert could—as the federal agency requested—encourage the then-existing, independently-selected board of directors and officers to resign and to allow the Bank Board to manage the institution.

25. Gaubert complied with the agencies' request. He met with board members and officials at IASA, and did encourage them to cooperate with the Bank Board's plans to permit the federal agencies to hand-pick a board and officers, and to manage IASA.

26. No other shareholder or officer or director of IASA was asked to (or did) assist the Bank Board in forcing a change of management at IASA.

(Federal Agencies Select, Install, And Indemnify Officers and Directors For IASA)

27. Complying with the FHLB-Dallas's demand, and with the understanding that the Bank Board and FHLB-Dallas would be overseeing the operations of IASA, all IASA directors tendered undated resignations. This was the first time the FHLB-Dallas had ever demanded the resignations of directors of an insured institution without first initiating a proceeding aimed at a supervisory agreement. No such proceeding had been initiated for IASA.

28. During the last week in March 1986 or in early April 1986, the directors were informed by FHLB-Dallas that their resignations had been dated, accepted, and that they need not return to IASA. They were replaced in April 1986 by Thomas E. Hendricks, who became the new President and Chief Operating Officer, and Milton H. Thomas, who became Chairman of the Board and Chief Executive Officer of IASA. Hendricks and Thomas were both selected and approved by the FHLB-Dallas. Immediately prior to his appointment as an officer of IASA, Hendricks had been an employee of the FHLB-Dallas. Prior to his appointment at IASA, Thomas had been on the Board of Directors of the FHLB-Dallas. Hendricks and Thomas negotiated the employment and compensation packages for their positions at IASA with senior officials of FHLB-Dallas, rather than with the shareholders or managers of IASA.

29. On or about June 18, 1986, still under the FHLB-Dallas's threat to close IASA if it did not cooperate, and still not under any formal or recognized regulatory agreement with the Bank Board, the FHLB-Dallas hand-picked Board of Directors was elected.

30. Both Hendricks and Thomas were selected for IASA by FHLB-Dallas President Roy Green, and other

officials of the FHLB-Dallas. As with the selection of Hendricks and Thomas, all of the new directors were selected by officials of the FHLB-Dallas.

31. The officers and directors chosen by the Bank Board and FHLB-Dallas for IASA had little or had no previous professional experience as directors or officers of a savings and loan association or other financial institution, and none was of high caliber and national reputation. For example, Hendricks had never before worked for a savings and loan association and Thomas' only experience was as a senior officer of a thrift which was deteriorating at the time he was employed.

32. Notwithstanding this lack of experience, the FHLB-Dallas and Bank Board provided *each* of its hand-picked IASA officers and directors with an indemnification agreement backed by the FSLIC. The new directors would not have accepted the directorships without the FSLIC indemnification. One officer was even afforded retroactive indemnification for statutory and regulatory violations of his actions as an officer of IASA. This indemnification stripped from the FHLB-Dallas-chosen directors their inherent fiduciary responsibility to manage IASA with the association's best interests in mind. The indemnification agreements also assured that these individuals would remain loyal first to FHLB-Dallas, Bank Board and FSLIC—and only secondarily to the shareholders of IASA.

(Federal Agencies Direct Day-To-Day Operations At IASA)

33. In addition to engineering the resignation and replacement of IASA management with directors and officers of their choosing, officials at the FHLB-Dallas actively involved themselves in IASA's affairs and played an increasingly larger role at IASA. Through the actions of

senior officials of FHLB-Dallas and the Bank Board, a constant federal presence was achieved at IASA. As some examples,

a. FHLB-Dallas hand-picked management would often call or meet with FHLB-Dallas officials to consult as to day-to-day affairs and operations of IASA.

b. Minutes of IASA's Board of Directors meetings reflect that FHLB-Dallas officials were not only consulted, but actually participated in management decisions made at these meetings.

c. Through their hand-picked directors, the FHLB-Dallas and the Bank Board did not merely exchange information with IASA, but became involved in giving advice, making recommendations, urging, or directing action or procedures at IASA.

34. FHLB-Dallas officials (including FHLB-Dallas President Roy Green, FHLB-Dallas Director of Regulatory Affairs H. Joe Selby, and William O. Churchill, the FHLB-Dallas supervisory agent assigned to IASA) advised their hand-picked directors and officers on a variety of subjects. The FHLB-Dallas supervisory agent for IASA was instructed by FHLB-Dallas President Roy Green to attend every IASA Board of Directors meeting. As some examples of FHLB-Dallas' pervasive involvement,

a. FHLB-Dallas officials arranged for the hiring for IASA of consultant J.E. Robert Company, and other consultants on operational and financial matters and asset management.

b. FHLB-Dallas officials urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered savings and loan in part so that it could become the exclusive government entity with power to control IASA. The FHLB-Dallas hand-picked Board of Directors even recommended or advised conversion to a

federal mutual association—a thrift owned by its depositors rather than corporate shareholders—without consulting with the shareholders whose equity interest would have been compromised by such a change in the form of ownership.

c. FHLB-Dallas officials were actively consulted by the FHLB-Dallas hand-picked Board of Directors, and gave advice and made recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy.

d. FHLB-Dallas mediated salary disputes between IASA and its senior officers.

e. FHLB-Dallas employees actually reviewed a draft complaint in litigation that its hand-picked Board of Directors contemplated filing. Those employees were so actively involved in giving advice, making recommendations, and directing matters related to IASA's litigation policy that they were able successfully to stall the Board of Directors' ultimate decision to file the complaint until the Bank Board *in Washington* had reviewed, advised on, and commented on the draft.

f. FHLB-Dallas employees actively intervened with the Texas Savings and Loan Department (IASA's principal regulator) when the State attempted to install a supervisory agent at IASA under a Texas State Savings & Loan Department Agreed Order. That intervention, in which FHLB-Dallas asked the State to defer the signing of a supervisory agreement, delayed the appointment of a State supervisory agent for IASA. Director of Regulatory Affairs H. Joe Selby reported directly to the Board of Directors at a Board of Directors meeting his success in postponing a meeting with Texas State officials and in preventing the signing of a supervisory agreement.

g. FHLB-Dallas President Green wrote correspondence to the IASA Board of Directors affirming

that his agency had placed that Board of Directors into office, and describing their mutual goal to protect the FSLIC insurance fund—with no mention of the directors' fiduciary responsibilities to IASA shareholders.

35. When Gaubert left his management position at the association in late 1984, IASA undoubtedly had a positive net worth which met all regulatory requirements. At the end of 1985, it continued to have a positive net worth.

(Federal Agencies' Intrusion Causes IASA To Lose Millions)

36. Within six months after the FHLB-Dallas had engineered the replacement of the existing IASA Board of Directors and effectively taken over the association, the FHLB-Dallas' hand-picked Board of Directors and officers announced that IASA had over a $400 million *negative* net worth. This appalling turnaround occurred while IASA was under the management of the FHLB-Dallas hand-picked Board of Directors, and while the FHLB-Dallas itself played an ever-increasing role in the day-to-day operations of IASA.

37. Among the other actions taken by the Bank Board's hand-picked management at IASA was its writing down of various IASA assets—including the Poole Lake property that Gaubert put up as part of the Investex and United merger and acquisition transactions.

38. To the extent that IASA became insolvent and to the extent that IASA's financial condition violated Bank Board rules and regulations, those conditions were caused by the FHLB-Dallas's assumption of the duty to select the management of IASA, and the negligent discharge of that assumed duty. FHLB-Dallas was assisted in its assumption and negligent discharge of the duty by the Bank Board and FSLIC.

39. To the extent that IASA became insolvent and to the extent that IASA's condition violated Bank Board rules and regulations, those conditions were caused by the FHLB-Dallas's assumption of the duty to participate in, and to make, the day-to-day decisions at IASA and its negligent discharge of that assumed duty. FHLB-Dallas was assisted in its assumption and negligent discharge of the duty by the Bank Board and FSLIC.

40. On or about January 20, 1987, at the regularly-scheduled annual meeting of IASA shareholders, the FHLB-Dallas hand-picked slate of candidates for the Board of Directors was defeated in their attempt to be legitimately elected or reelected. The shareholders of IASA instead elected some of the former IASA directors, who had earlier served on the Board of Directors when IASA was a successful association, reporting positive net worth and assets.

41. From on or about January 20, 1987 until May 1987, FHLB-Dallas officials repeatedly requested that Texas State officials permit the Bank Board to close IASA.

42. On May 20, 1987, Gaubert filed with the FHLB-Dallas, the Bank Board, and the FSLIC an administrative tort claim alleging that these agencies had caused the ruin of IASA. Later that very same day, the Bank Board acted to cause Texas State officials to close IASA, and to place IASA into the receivership of FSLIC.

43. In a letter dated November 20, 1987, the Bank Board denied Gaubert's administrative tort claim and notified him that he had six months within which to institute suit under the Federal Tort Claims Act.

COUNT I

(Negligent Selection of Directors and Officers)

44. Plaintiff restates and incorporates paragraphs 1 through 43 of this Complaint.

45. FHLB-Dallas was assisted throughout the time period of this complaint by the Bank Board and FSLIC.

46. The FHLB-Dallas assumed the duty of care in selecting directors and officers to run IASA.

47. The FHLB-Dallas discharged this assumed duty negligently and breached this duty of care in selecting individuals who were inexperienced, unqualified, and unable to deal adequately with both routine financial and other unusual problems at IASA.

48. The negligent performance and discharge of this duty was the cause of the failure of IASA.

49. The negligent discharge of this duty, and the concomitant failure of IASA caused plaintiff Gaubert to lose his investment in IASA, which, in the first quarter of 1985 was worth $75 million and his Poole Lake property valued at over $25 million.

50. It was reasonable for the association and its directors, officers, and shareholders to rely on the officers and directors hand-picked by the FHLB-Dallas.

51. The circumstances of this case are such that if the United States were a private person, liability would be imposed under the laws of the state of Texas.

COUNT II

(Negligent Involvement in Day-to-Day Operations)

52. Plaintiff restates and incorporates paragraphs 1 through 43 of this complaint.

53. FHLB-Dallas was assisted throughout the time period of this complaint by the Bank Board and FSLIC.

54. Even after selection of the FHLB-Dallas hand-picked Board of Directors, the FHLB-Dallas improperly continued its involvement in the day-to-day operations of IASA.

55. The involvement of the FHLB-Dallas in the affairs of IASA went beyond its normal regulatory activity, and the agency actually substituted its decisions for those of the directors and officers of the association.

56. The FHLB-Dallas was so extensively involved in IASA that it was reasonable for the association and its directors, officers, and shareholders to rely on the decisions made by the FHLB-Dallas.

57. The FHLB-Dallas assumed the duty of care in directing the operation of IASA.

58. The FHLB-Dallas discharged this duty negligently and breached this duty of care in directing the operation of IASA.

59. The FHLB-Dallas-induced failure of IASA caused plaintiff Gaubert to lose his investment in IASA, which, in the first quarter of 1985, was worth $75 million, and his Poole Lake property valued at over $25 million.

60. The circumstances of this case are such that if the United States were a private person, liability would be imposed under the laws of the state of Texas.

WHEREFORE, Plaintiff demands damages in the amount of $100 million, his costs and attorneys' fees, and such other relief as may be deemed just and appropriate by the Court.

Respectfully submitted this 11th day of April, 1988.

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Thomas M. Gaubert

Supreme Court of the United States

No. 89-1793

UNITED STATES, PETITIONER

v.

THOMAS M. GAUBERT

ORDER ALLOWING CERTIORARI. Filed June 18, 1990.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

June 18, 1990

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No. 89-1793 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether supervisory actions that were taken by federal regulators of financial institutions, and that required the exercise of policy discretion, fall within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), regardless of whether those actions may be categorized as "operational" in nature.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 885 F.2d 1284. The district court opinion (Pet. App. 21a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on October 17, 1989. A petition for rehearing was denied on January 5, 1990. Pet. App. 30a. On March 23 and April 27, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including May 17, 1990. The petition was filed on May 16, 1990, and was granted on June 18, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The relevant section of the Federal Tort Claims Act, 28 U.S.C. 2680(a), is reprinted in an appendix to this brief.

STATEMENT

This tort action arises out of regulatory activities undertaken by officials of the Federal Home Loan Bank Board (FHLBB or the Board) and the Federal Home Loan Bank-Dallas (FHLB-D), with respect to Independent American Savings Association (IASA), a now-failed Texas thrift institution. Respondent Thomas Gaubert, a major shareholder and former officer of IASA, brought this action under the Federal Tort Claims Act (FTCA); 28 U.S.C. 1346(b), 2671-2680. Respondent contends that he suffered personal financial losses because of IASA's failure, and he alleges that this failure was caused by negligence of federal regulators in their supervision of IASA. The sole issue presented for review is whether the court of appeals correctly interpreted the FTCA's discretionary function exception, 28 U.S.C. 2680(a).[1]

1. *Regulatory Background*

The context within which the actions at issue took place is the extensive statutory scheme for the federal regulation of financial institutions. As a state-chartered thrift institution whose accounts were insured by the Federal Savings and Loan Insurance Corporation (FSLIC), IASA was subject to federal regulation pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724-1730i (1988).[2]

These statutory powers were entrusted to a number of related federal bodies, all under the overall supervision of the Board. The Board itself was an independent

[1] Neither party has sought review of the other aspects of the court of appeals' decision, regarding respondent's ability under Texas law to assert his claims for (1) the diminution of the value of his corporate stock and (2) his loss of personal assets. See Pet. App. 14a-20a; pp. 13-14 note 12, *infra*.

[2] The regulatory scheme as here described is that in place in 1984 through 1986, the time of the actions at issue. As discussed below, many of the regulatory functions have been altered or shifted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183.

agency of the federal government, with broad responsibilities for the regulation of both federally chartered and state-chartered thrift institutions. See 12 U.S.C. 1437 (1988). FSLIC was a corporation that was established by Congress to provide insurance for deposits in both state and federally chartered thrift institutions and that operated under the direction of the Board. 12 U.S.C. 1725(a) (1988). FSLIC operated in two separate and legally distinct capacities—as a federal regulator (charged with protecting the insurance fund against undue risk by examining and regulating insured institutions), and as a receiver of failed institutions. The Federal Home Loan Banks, including FHLB-D, were regional banks established by the Board for the purpose of assisting member institutions. 12 U.S.C. 1423 (1988). The Board supervised the activities of the various FHLBs, and was specifically empowered to assign to the personnel of any FHLB most of the regulatory functions of the Board itself, or of FSLIC. 12 U.S.C. 1437(a) (1988).[3]

The regulatory powers of greatest relevance here are those provided in 12 U.S.C. 1729 and 1730 (1988). Section 1729(c), for example, empowered the Board, under certain circumstances, to appoint FSLIC as the conservator or receiver of an insured institution. Section 1730 conferred a wide range of enforcement authority on FSLIC, in its regulatory capacity, over state-chartered thrift institutions.[4] For example, Section 1730(b)

[3] In this case, it appears that the alleged actions of FHLB-D personnel would constitute actions on behalf of the relevant federal agencies, FHLBB or FSLIC, within the meaning of the FTCA, 28 U.S.C. 2671, since the personnel were performing delegated functions for those agencies. We note that the question whether FHLB-D would itself be a "federal agency" for purposes of the FTCA is an undecided issue that is not posed by this case. Cf. *Colony First Federal Savings & Loan Ass'n* v. *FSLIC*, 643 F. Supp. 410, 416 n.4 (C.D. Cal. 1986) (noting but declining to decide this question).

[4] The Board itself directly exercised such authority over federally chartered thrifts, under the analogous provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 (1988).

provided for formal proceedings that could result in the termination of FSLIC insurance. Section 1730(e) provided for proceedings in which FSLIC could issue orders requiring an insured institution to cease and desist from engaging in any practices found either to be in violation of a pertinent statute or regulation, or to constitute an unsafe or unsound banking practice. Section 1730(f) provided for expedited, temporary cease-and-desist orders under certain circumstances. Section 1730(g) provided for the suspension or removal of any officer or director of an insured institution on a number of grounds, including violations of a statute, regulation, or fiduciary duty. Pursuant to 12 U.S.C. 1730(m)(2), FSLIC also had broad investigatory powers in aid of its regulatory functions.

Not all instances of misconduct or regulatory concern have been handled by institution of such formal proceedings. Like other federal regulators, the Board and FSLIC have often engaged in more informal methods of ensuring compliance with regulatory standards. Regulators may, for example, forbear from initiating formal enforcement proceedings in exchange for assurances that regulated parties will refrain from certain conduct or take specified corrective steps. Federal agencies involved in the regulation of financial institutions have turned to such approaches frequently, especially in light of the growing case load confronting those agencies. See generally *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 330 (1963); Vartanian & Schley, *Bank Officer and Director Liability—Regulatory Actions*, 39 Bus. Law. 1021, 1027-1028 (1984). In a policy statement, FHLBB specifically addressed the use of such procedures, noting the appropriateness in many instances of "informal supervisory guidance" or negotiated "supervisory agreement[s]" in lieu of formal regulatory steps. See FHLBB Res. No. 82-381 (May 26, 1982).[5]

[5] Subsequent to the events upon which this action is based, Congress enacted major changes in the statutory scheme for federal thrift regulation in FIRREA. Although that legislation does not directly affect this litigation or any of the underlying regulatory actions, we set forth a very brief sketch of its provisions to place the present controversy in context, and to reflect the continuing importance of the issues presented in this case.

FIRREA was a response to what Congress termed a "crisis" in the thrift industry. See H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 294, 302-305 (1989). This crisis was brought about, in Congress's view, by a combination of factors including precipitous growth by many institutions—often combined with poor management and fraudulent practices—and the lack of resources for sufficiently vigorous enforcement efforts. *Id.* at 298-301. Congress sought to address these problems by fostering "stronger supervisory oversight" of thrift institutions. *Id.* at 307-308.

FIRREA makes major changes in the federal regulatory structure and has created new federal agencies to deal with the affairs of failed thrift institutions, yet it has not altered the basic regulatory tools available to deal with the problems of troubled institutions. For example, while FIRREA abolishes FHLBB and FSLIC and repeals the specific statutory enforcement provisions invoked in this case, see FIRREA §§ 401, 407, 103 Stat. 354-357, 363, it assigns substantially similar authority for examinations, cease-and-desist orders, and the imposition of receiverships to the Federal Deposit Insurance Corporation and the newly created Office of Thrift Supervision. FIRREA §§ 201, 301, 103 Stat. 187-188, 277-343. Despite other provisions of FIRREA that enhance enforcement authority in various ways, see FIRREA §§ 901-968, 103 Stat. 446-506, there is no reason to doubt that these agencies will continue to use the sort of informal, supervisory techniques used in the present case, in an effort to assist regulated institutions without invoking formal regulatory procedures. Indeed, the regulatory workload engendered by the large number of troubled thrift institutions across the Nation will undoubtedly require federal regulators to employ such techniques in order to provide the "vigilant and responsive" regulatory action mandated by Congress. H.R. Rep. No. 54(I), *supra*, at 291.

2. *Factual Background* [6]

In 1983, respondent acquired a controlling interest in Citizens Savings and Loan Association, a federally insured thrift institution chartered by the State of Texas.

[6] In granting the motion of the United States to dismiss, the district court did not resolve any disputed factual issues; those issues therefore remain to be resolved if the action is not dismissed. The background stated here is drawn either from the amended com-

A new board of directors (of which respondent was the chairman) changed the name of the institution to Independent American Savings Association and embarked on a course of substantial expansion. J.A. 7-8; Exh. J, at 58-59. The actions on which respondent's complaint is based began in early 1984.

In May 1984, the FHLB-Des Moines requested the institution of an investigation, pursuant to 12 U.S.C. 1730(m)(2), of certain operations of Capitol Savings and Loan Association, an Iowa institution in which respondent had had substantial dealings.[7] During that period, IASA proposed to enter into two transactions that would greatly increase the scope of its operations: the purchase of Investex Savings Association, a troubled Texas thrift institution; and the purchase of 22 branch offices from United Savings Association, another Texas thrift. See Amended Compl. paras. 16-19, J.A. 9-10;

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plaint, J.A. 6-19, or from certain exhibits to the motion of the United States to dismiss the complaint that were provided to the district court "for background only." Memo. in Support of Mot. of the United States to Dis. the Compl. 32 n.22 (dated Mar. 17, 1988). These exhibits include various written agreements between federal regulators and respondent or IASA, a January 1987 FHLBB memorandum recommending the appointment of a receiver for IASA, and an April 1987 report by an independent counsel engaged by FHLBB to look into respondent's allegations of misconduct by personnel of FHLB-D, FSLIC, and FHLBB. The exhibits are cited herein as "Exh. ——."

Because the government's dismissal motion based on the discretionary function exception went to subject matter jurisdiction, these background materials were properly before the district court. See *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 213 (2d ed. 1990) ("When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other matter to support the motion.").

[7] See Report of Independent Counsel Aubrey B. Hardwell, Jr., to Chairman Edwin J. Gray, Federal Home Loan Bank Board 64-65 (Apr. 21, 1987) (Exh. J); Amended Compl. para. 12, J.A. 9.

Exh. J, at 60-63.[8] Completion of those transactions required approval by federal regulators. See 12 U.S.C. 1730(q) (1988); 12 C.F.R. Pt. 574.

In part because of concerns of possible misconduct by respondent relating to the Iowa institution, federal officials had misgivings about permitting this substantial expansion of IASA under respondent's control. See Exh. J, at 68. Some officials also expressed concern as to whether IASA, with the greatly increased assets and liabilities it would have following the proposed transactions, would be adequately capitalized. *Id.* at 69. In late 1984, FHLB-D and FHLBB staff recommended the institution of formal proceedings to remove respondent as an officer and director of IASA and prohibit his further involvement with its management (pursuant to 12 U.S.C. 1730(g)(2) (1988)), and the institution of a formal examination of IASA (pursuant to 12 U.S.C. 1730(m)(2) (1988)).[9] Meanwhile, federal regulators were engaged in negotiations with IASA and respondent concerning possible ways of allaying these concerns and allowing the transactions to go forward. See Exh. J, at 69-74. These negotiations resulted in the execution in December 1984 of a written "neutralization agreement" between respondent and the federal regulators. See Amended

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[8] Respondent's allegations are ambiguous with respect to the initiative for this merger. While the heading above paragraph 16 of the amended complaint recites, "Federal Agencies Seek To Merge IASA With Investex," paragraph 16 itself refers to IASA's "application." J.A. 9. Resolution of any factual dispute on this point is unnecessary to the adjudication of this case. The court of appeals decided the case on the premise that FHLBB "wanted IASA to merge" with Investex, Pet. App. 2a, and ruled that any such "decision to merger IASA with Investex * * * was a policy oriented decision protected [under the discretionary function exception]." Pet. App. 13a-14a. Respondent has not sought review of that portion of the court of appeals' ruling.

[9] See Recommendation for Appointment of a Receiver for Independent American Savings Association 27-28 (Jan. 21, 1987) (Exh. C).

Compl. paras. 12-15, J.A. 9; Exh. J, at 77-78. The agreement provided that respondent would resign from management positions at IASA and refrain from any participation in the management of the institution, and imposed limits on respondent's ability to vote or transfer his IASA stock. Exh. J, at 77-78. The agreement also included a guarantee by respondent of IASA's net worth, backed by his pledge of personal assets. See Amended Compl. para. 14, J.A. 9; Exh. J, at 78. Federal regulators approved the proposed acquisitions noted above, Exh. J, at 78, and offered advice and assistance to IASA in carrying out these transactions. Amended Compl. para. 19, J.A. 10.

During 1985, investigations continued, and in August 1985 the FHLBB staff recommended the institution of proceedings, pursuant to 12 U.S.C. 1730(g)(2) (1988), permanently to bar respondent from involvement with FSLIC-insured institutions. See Exh. J, at 95-105; Exh. C, at 31-32. Discussions continued between respondent and federal regulators in late 1985, resulting in a second agreement, set forth in a letter from respondent to the FHLBB dated December 17, 1985. Exh. D. Under the terms of that agreement, respondent agreed to remove himself permanently from IASA's management and not to serve as an officer or director of any FSLIC-insured institution without prior approval. In return, FHLBB agreed to discontinue the investigation it was conducting under 12 U.S.C. 1730(m)(2) (1988) and to forbear from the institution of removal proceedings under 12 U.S.C. 1730(g)(2) (1988).

Early in 1986, additional matters came to light that increased the federal regulators' concerns regarding IASA's soundness. In February and March 1986, reports from a management consulting firm indicated that IASA was in a precarious financial situation. Exh. C, at 39. The report cited numerous possible regulatory violations, as well as unsafe and unsound practices. *Ibid.* FHLBB personnel commenced a special examination of IASA on March 3, 1986, which also revealed unsafe and

unsound financial practices and other regulatory violations. *Id.* at 39-41. In lieu of instituting formal proceedings against IASA, the federal regulators entered into discussions with IASA, as a result of which IASA officers and directors resigned and were replaced by individuals approved by FHLB-D personnel. See Amended Compl. paras. 20-32, J.A. 10-13.[10] FHLB-D provided indemnification of the new officers and directors in order to induce them to take on these responsibilities. *Id.* para. 32, J.A. 13; Exh. C, at 46.

According to the reports mentioned above and others prepared by accounting and consulting firms, IASA at this time faced substantial difficulties—including books that were not in condition to permit a reliable audit, and the prospect of continuing financial losses. See Exh. C, at 47-48. The new IASA officers and directors took various steps aimed at dealing with this situation, such as making major adjustments to IASA's financial statements and placing an IASA subsidiary into bankruptcy. *Id.* at 48-49. During this time, federal regulators continued to forbear from taking formal regulatory actions against IASA, but consulted regularly with IASA personnel about their efforts to deal with the situation. See Amended Compl. paras. 33-37, J.A. 13-16. As alleged in the amended complaint, FHLB-D officials frequently gave advice to IASA managers on a variety of topics. *Id.* para. 33, J.A. 14. Specifically, the amended complaint charges that FHLB-D personnel "arranged for" the hiring of a particular consultant by IASA, urged IASA to convert to federally chartered status, gave advice concerning the placement of subsidiaries into bankruptcy, mediated salary disputes involving IASA officers, reviewed draft litigation papers, and "intervened" in deal-

[10] Federal regulatory authorities have since brought two actions against respondent and other former IASA officers and directors for negligence and breach of fiduciary duties to IASA. See *FDIC, As Manager of the FSLIC Resolution Fund* v. *Gaubert*, No. CA3-90-1196-G (N.D. Tex. filed May 18, 1990); *FSLIC* v. *Crowe*, No. CA 3-86-3166-T (N.D. Tex. dated May 4, 1989).

ings between IASA and a state regulatory body. *Id.* para. 34, J.A. 14-16.

Whether in spite of or (as respondent alleges) because of these efforts, IASA's condition continued to decline. In January 1987, FHLBB began consideration of a recommendation that IASA be put into receivership. See Exh. C. At about the same time, the IASA shareholders declined to elect a slate of directors allegedly chosen by federal regulators, and reinstated some of the individuals who had earlier been on the board. See Amended Compl. para. 40, J.A. 17; *Gaubert* v. *FHLBB*, 863 F.2d 59, 61 (D.C. Cir. 1988). Subsequently, the State of Texas became conservator, there was another board change, and ultimately in May 1987 the Texas Savings and Loan Department closed IASA. FHLBB thereupon promptly exercised its authority, pursuant to 12 U.S.C. 1729(c)(2) (1988), to appoint FSLIC as the receiver. See *Gaubert* v. *Hendricks*, 679 F. Supp. 622, 623 (N.D. Tex. 1988).

3. *Proceedings Below*

a. Following the denial of an administrative claim made under 28 U.S.C. 2675, respondent instituted this FTCA action in April 1988.[11] As amended, respondent's

[11] The present action is one of several that respondent has filed arising out of the same underlying events. He also filed two derivative actions on behalf of IASA—one against FHLBB and other federal agencies, and one against the IASA directors elected in 1986—both of which were dismissed. See *Gaubert* v. *FHLBB*, Civ. No. 87-1682-LFO (D.D.C. Feb. 12, 1988) (*reprinted at* Exh. A), aff'd, 863 F.2d 59 (D.C. Cir. 1988); *Gaubert* v. *Hendricks*, 679 F. Supp. 622 (N.D. Tex. 1988). He also filed an action against various federal officials in their individual capacities, alleging both common law torts and constitutional torts under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). *Gaubert* v. *Gray*, No. 87-3500 (D.D.C. filed Dec. 24, 1987). A motion to dismiss that action is now pending. More recently, respondent has filed an action against the United States in the Claims Court, alleging that the actions of federal regulators amounted to a "taking" of his property in violation of the Fifth Amendment, as well as several breach of contract counts purportedly based on the neutralization agreement. *Gaubert* v. *United States*, No. 90-434 C (Cl. Ct. filed May 21, 1990).

Respondent also raised regulatory negligence as a counterclaim in *FSLIC* v. *Crowe*, *supra*. That counterclaim was dismissed on June 16, 1990.

complaint contained allegations regarding most of the matters discussed above, including the neutralization agreement, Amended Compl. paras. 12-15, J.A. 9; the actions surrounding the approval of the Investex merger, *id.* paras. 16-19, J.A. 9-10; the replacement of IASA's management, *id.* paras. 20-26, J.A. 10-11; the installation of a new board of directors, *id.* paras. 27-32, J.A. 12-13; and the subsequent involvement of federal regulators in IASA's "day-to-day operations," *id.* paras. 33-37, J.A. 13-16. Respondent further alleged that federal officials acted negligently in carrying out these activities, *id.* paras. 44-58, J.A. 17-19, and that IASA's insolvency and other problems were caused by such negligence, *id.* paras. 38-39, 49, 59, J.A. 16-17, 18, 19.

The United States moved to dismiss on the ground that the challenged actions were exempt from suit under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). The district court granted the motion, holding that all of respondent's claims were barred by that exception. Pet. App. 21a-26a. The court recognized that the amended complaint focused on actions suggested to IASA by federal regulators, in which IASA was induced to acquiesce by the threat of receivership or other formal regulatory action. *Id.* at 23a-24a. Concluding that a decision to seek receivership would unquestionably fall within the discretionary function exception, the court determined that a decision to exert informal suasion in lieu of such formal enforcement is likewise discretionary in nature and therefore also within the exception. *Id.* at 24a-25a. Accordingly, the court concluded that the present action fell outside the FTCA's limited waiver of sovereign immunity. *Id.* at 25a-26a.

b. The court of appeals reversed in part, holding that as a matter of law certain actions taken by the federal

regulators were not subject to the discretionary function exception. Pet. App. 1a-20a.

The court began its analysis of the discretionary function exception with a discussion of this Court's ruling in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). Pet. App. 6a-7a. While acknowledging that the government had not invoked the discretionary function exception in that case, the court of appeals referred to the case as having established a "principled distinction between policy decisions and operational actions," a distinction that "still retains its force today and is dispositive of this case." *Id.* at 7a. The court of appeals then discussed this Court's recent discretionary function cases, *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and *Berkovitz* v. *United States*, 486 U.S. 531 (1988). Pet. App. 7a-11a. With respect to *Varig Airlines*, the court noted this Court's central holding that the discretionary function exception is aimed at "prevent[ing] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 9a (quoting *Varig Airlines*, 467 U.S. at 814). And in *Berkovitz*, the court of appeals observed, the discretionary function analysis had been ruled unavailable where government officials violate express statutory or regulatory requirements. *Id.* at 10a. The court then stated that the holding in *Berkovitz* was "[u]nfortunately" not dispositive of this case, since FHLBB and FHLB-D officials did not violate any express statutory or regulatory provisions. *Id.* at 11a. The court found guidance, however, in a footnote in *Berkovitz*, which cited *Indian Towing* as an example of a case not involving the sort of policy discretion covered by the discretionary function exception. *Ibid.* (quoting *Berkovitz*, 486 U.S. at 538 n.3). In the court of appeals' view, "[a]ny doubts about the sustained viability of th[e] ["discretionary function/operational activity"] distinction were put to rest" by that footnote. *Ibid.* Thus, the court concluded, any activity that is

"operational in nature" necessarily falls outside the scope of the exception. *Id.* at 12a. The court stated, in summary, that "the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in *Indian Towing*." *Id.* at 12a-13a.

Applying what it called "the *Indian Towing* test," Pet. App. 13a, to the activities at issue in this case, the court of appeals agreed with the district court about the initial actions taken by the federal regulators. "Clearly, the decision to merge IASA with Investex and seek a neutralization agreement from [respondent] was a policy oriented decision protected by § 2680(a)." *Id.* at 13a-14a. "Similarly," the court went on, "the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception." *Id.* at 14a. The court held, however, that the federal regulators ceased to perform "discretionary functions"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in ¶¶ 33-43 of [respondent's] amended complaint.

Ibid. On the basis of this holding, the court remanded the case to the district court for further proceedings. *Id.* at 19a-20a.[12]

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[12] Because the court of appeals reversed a portion of the district court's judgment on the discretionary function exception, it addressed certain issues pretermitted by the district court. Pet. App. 14a-20a. The court held that, under Texas law regarding injuries suffered by corporations, respondent could not sue for the alleged diminution of the value of his IASA stock. *Id.* at 19a. But with respect to the personal property respondent posted as a guarantee as part of the neutralization agreement—alleged to be worth $25

SUMMARY OF ARGUMENT

A. The court of appeals erred by deciding the discretionary function issue in this case without carefully assessing the nature of the discretion exercised, and by relying instead on a mechanical test that finds no support in the language, history, or policies of the FTCA. Congress considered the discretionary function exception an important element of the FTCA, and drafted it broadly to cover a wide range of "discretionary" governmental activities. The exception, which has its roots in concern for the discretion of federal regulatory agencies, reaches even clearly negligent acts, and—by its express terms—even those constituting abuse of discretion.

This Court first addressed the discretionary function exception in *Dalehite* v. *United States*, 346 U.S. 15 (1953). There, the Court, drawing heavily on the legislative history of the FTCA and historic legal concepts of "discretionary" governmental activity, gave a broad reading to the exception, concluding that "[w]here there is room for policy judgment and decision there is discretion." *Id.* at 36. Subsequently, in *Varig Airlines*, the Court reaffirmed the principles of *Dalehite* and refuted any notion that intervening cases had undermined its authority. *Varig Airlines* reaffirmed that "it is the nature of the conduct," regardless of the level at which it is taken, that governs application of the discretionary function exception, and emphasized that actions of the government "in its role as a regulator" lie at the core of the exception. 467 U.S. at 813-814.

In its most recent discretionary function case, *Berkovitz* v. *United States*, 486 U.S. 531 (1988), the Court dealt with the particular issue of governmental actions alleged to be in violation of specific statutory or policy mandates. Ruling that where a specific course of action is prescribed

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million—the court ruled that respondent might be able to maintain a cause of action. *Ibid.* The court remanded the case to the district court for resolution of that state law issue. *Id.* at 19a-20a.

by law there can be no discretion at all, the Court concluded that the exception would not apply to such cases. Otherwise, however, the Court reaffirmed the vitality of the basic test of *Dalehite* and *Varig Airlines*, which remain the controlling precedents in cases where there is no contention that federal officials violated specific legal mandates.

In this case, the court of appeals explicitly acknowledged that the central principle of *Berkovitz* is inapt, because the federal officials here violated no express legal mandate. The court failed, however, to apply the principles of *Dalehite* and *Varig Airlines*, relying instead on a mechanical exclusion from the discretionary function exception of all "operational" activities. Contrary to the lower court's supposition, such a test is not supported by this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), and is inconsistent with *Dalehite* and *Varig Airlines*.

The "operational" limitation espoused by the court of appeals is contrary to the language, history, and policies of the FTCA. The text of the discretionary function exception itself contains no qualification excluding "operational" actions. Moreover, the examples of "discretionary" actions cited in the legislative history of the FTCA confirm that the exception applies to "operational level" activities in many instances. The court of appeals' artificial limitation would also violate the basic principle, established in *Dalehite* and *Varig Airlines*, that application of the exception depends upon the nature of the discretion exercised, not the level at which action is taken.

B. Because the court of appeals failed to apply the proper test in making its discretionary function ruling, this Court could simply reverse on that ground, and remand for consideration on the basis of the correct legal principles. But in light of the importance of this issue to federal efforts to cope with the crisis facing the savings and loan industry, we submit that it would be preferable, and appropriate on this record, for the Court

itself to apply the correct standard and uphold the district court's judgment.

Nearly all of the factual assertions in the amended complaint that the court of appeals characterized as "operational" in nature consisted of advice and recommendations made by federal regulators to IASA managers and directors. Providing the sort of advice federal officials are alleged to have offered IASA on various complex commercial matters obviously required the exercise of discretion. Even without reference to the regulatory context in which the advice was given, such activities fall within the discretionary function exception because they necessarily relate to economic policy. As reflected in *Dalehite* and in numerous decisions of the lower courts, governmental decisions significantly affecting the expenditure of public funds, or otherwise involving discretionary commercial activities, fall squarely within the scope of actions the discretionary function exception was designed to shield.

Moreover, the regulatory context in which any such advice was offered here removes any question as to its status under the exception. The courts have consistently recognized that invocation of any of the broad powers that federal regulatory agencies possess with respect to financial institutions—such as issuing a cease and desist order or imposing a receivership—is a discretionary matter falling within the exception. Where, as here, federal officials instead act informally, seeking to assist an institution take steps to avoid sterner regulatory actions, those actions are still integral to the federal officials' regulatory mission, and still require discretionary, policy-oriented decisions. And any recommendations that federal regulators may have made to state regulatory officials regarding discretionary decisions by those officials fall even more clearly into the core area of governmental discretion protected by the FTCA exception.

While the sovereign immunity of the United States has been partially waived by the FTCA, the courts have rec-

ognized modern policy bases that give that doctrine continuing vitality where it has not been so waived. The discretionary function exception serves these policies, all of which are implicated in the present case. Imposition of tort liability in circumstances such as these would inhibit vigorous decision making by federal officials at a time of acknowledged crisis. It also would impermissibly skew regulatory actions by imposing liability where officials seek to assist financial institutions informally, but not where they exercise more intrusive regulatory powers. Given the scope of the difficulties facing the savings and loan industry today, and the great losses that may result from the failure of a thrift institution, permitting actions of this sort would also expose the United States to enormous and unpredictable liabilities—liabilities that Congress has not determined to accept. Finally, the deference due the judgments of the federal banking agencies cautions against judicial intrusion into an area, like this one, that calls for difficult judgments ill-suited to judicial inquiry.

ARGUMENT

THE CHALLENGED ACTIONS OF THE FEDERAL REGULATORY OFFICIALS ALL FIT WITHIN THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA

A. The Court Of Appeals Erred In Concluding That The Discretionary Function Exception Does Not Apply To "Operational" Activities

The court of appeals' key holding was that certain actions taken by federal thrift regulators fell outside the FTCA discretionary function exception because they were operational in nature. That ruling was incorrect as a matter of law because it was based entirely on a limitation found nowhere in the text of the FTCA and unsupported by the policies and history of that law as well as this Court's decisions interpreting it. The relevant question is not whether the challenged actions of the federal regulators were "operational," but whether those actions were "discretionary," *i.e.*, whether they were they "grounded in social, economic, and political policy," *Varig Airlines*, 467 U.S. at 814, and taken in a context affording those officials "room for policy judgment and decision," *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953).

1. *The discretionary function exception protects the judgments of federal officials that are grounded in social, economic, or political policy*

a. The FTCA was enacted as part of the Legislative Reorganization Act of 1946, ch. 753, Tit. IV, 60 Stat. 842, which contained a broad range of initiatives to streamline and improve the workings of Congress itself. While the FTCA's waiver of sovereign immunity for tort actions was the product of long congressional consideration, see *Dalehite*, 346 U.S. at 24-25, its ultimate passage was prompted in large part by the need "to relieve Congress of [the] time-consuming chore" of considering private bills for the relief of citizens with tort claims against

the government. See S. Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946); *Dalehite*, 346 U.S. at 24-25 & n.9. Congress focused particularly on the need to provide judicial remedies for the burgeoning number of commonplace torts, including "such torts as negligence in the operation of vehicles," S. Rep. No. 1400, *supra*, at 31, stemming from the expansion of the federal government. See *Dalehite*, 346 U.S. at 28 & nn.19-20.

Congress used caution in approaching the historic step of waiving the sovereign immunity of the United States for tort claims. It included in the FTCA a number of exceptions to that waiver, and several of these exceptions are geared to situations where the imposition of tort liability would be novel or the impact of liability on the public fisc could be large and unpredictable. For example, specific exceptions bar claims based on the loss or miscarriage of mail, 28 U.S.C. 2680(b), the assessment of taxes or customs duties or the detention of goods by law enforcement officials, 28 U.S.C. 2680(c), or combatant activities of military forces in time of war, 28 U.S.C. 2680(j). All of these exceptions, including the discretionary function exception of 28 U.S.C. 2680(a) at issue here, are limitations on the FTCA's waiver of sovereign immunity and therefore must be read in light of the principle that statutes waiving the immunity of the United States from suit "are to be construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). See *Dalehite*, 346 U.S. at 31; *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986).

This case involves one of the broadest and most important of the FTCA exceptions, that for discretionary functions. While the legislative history of the final passage of the FTCA in 1946 sheds little light on this provision, see, *e.g.*, S. Rep. No. 1400, *supra*, at 33 (paraphrasing FTCA exceptions without elaboration), this Court has recognized the significance of earlier congressional con-

sideration. See *Dalehite*, 346 U.S. at 26-30. The predecessors of the present exception were agency-specific exceptions precluding tort liability based on the activities of two major federal regulatory bodies, the Federal Trade Commission and the Securities and Exchange Commission. See *Varig Airlines*, 467 U.S. at 809 & n.8; *Dalehite*, 346 U.S. at 26 & n.11. In 1942, the 77th Congress generalized this exception, drafting a provision that broadly applied to all federal regulatory activities and numerous other areas in which federal officials exercise discretion. The text of the exception drafted by that Congress is identical to the one ultimately adopted in 1946 and still in force today. *Varig Airlines*, 467 U.S. at 809.

As this Court has repeatedly recognized, both the Executive sponsors of the legislation and the congressional committees that approved the language of the exception regarded it as a "highly important" element of the FTCA. *Dalehite*, 346 U.S. at 29 n.21 (quoting H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942)); *Varig Airlines*, 467 U.S. at 809 (quoting *Hearings on H.R. 5373 and H.R. 6433 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942) (statement of Assistant Attorney General Shea)). The explanation of the exception as presented by the Executive and as adopted by the congressional committees[13] reflects the breadth and diversity of the situations to which it applies. The House committee explained, for example, that the exception would bar liability for negligent acts carried out in conjunction with an authorized flood control or irrigation project, even where the same sort of conduct would be actionable if conducted by a private party. H.R. Rep. No. 2245, *supra*, at 10.

[13] The Court noted in *Varig Airlines* that the key passage in the committee reports was based almost verbatim on the remarks of Assistant Attorney General Shea. 467 U.S. at 810 n.9. The text of that passage, as it appeared in H.R. Rep. No. 2245, is set out in full in *Dalehite*, 346 U.S. at 29-30 n.21.

Of special relevance to this case, the committee also explained how the second clause of the exception, which focuses on "discretionary function[s]," would operate. The committee stated that the exception was

> designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.

H.R. Rep. No. 2245, *supra*, at 10. As that passage reflects, Congress specifically intended the exception to reach even actions taken negligently, or in a manner constituting an abuse of discretion, and in doing so had the activities of federal regulatory agencies foremost in mind.

b. As the Court noted in *Dalehite*, its first case to involve the discretionary function exception, Congress's use of the language of "discretion" in the second phrase of 28 U.S.C. 2680(a) reflects a "concept of substantial historical ancestry in American law"—that of "the discretion of the executive or the administrator to act according to one's judgment of the best course." 346 U.S. at 34 (citing, inter alia, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). The "discretion" protected by the FTCA is similar to that recognized in other areas such as mandamus and injunction suits, where the courts have traditionally distinguished between the sort of "ministerial" duties of public officials that the courts may direct and other sorts of duties, those involving "nice issues of judgment and choice," that are properly left to

the discretion of the Executive branch. See, *e.g.*, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317 (1958) (declining to intervene in the setting of tolls for the Panama Canal, on the ground that it involved discretionary choices regarding accounting methods). See generally 2 L. Jayson, *Handling Federal Tort Claims* § 248.03 (1989).

In applying those principles in *Dalehite*, this Court concluded that Congress intended the exception to embrace a broad range of "discretionary" activities. 346 U.S. at 24-34. The Court flatly rejected the plaintiffs' argument that the exception applies only to high-level policy decisions. *Id.* at 34-35. The Court held instead that

> the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Id. at 35-36 (footnote omitted). The breadth of the "discretionary" activities to which that reasoning applies is also apparent from the manner in which *Dalehite* dealt with the various alleged acts of negligence at issue, all of which arose from a devastating shipboard explosion of fertilizer bound for Europe as part of a federal post-war relief program. The Court gave short shrift to any notion that the cabinet-level decision to export the fertilizer, or a decision to proceed with its manufacture without conducting further safety tests, could be anything but "discretionary" under the FTCA. *Id.* at 37-38. The Court then went on to consider more specific allegations of negligence in decisions relating to the actual manufacture of the fertilizer. *Id.* at 38-42. The Court determined, for example, that the decision to use a particular type of coating, although based largely on technical factors, necessarily involved the balancing of competing considerations and had ramifications for the feasibility of the program. *Id.* at 40. Similarly, a decision concerning the temperature at which to bag the fertilizer fell within the exception because it involved a balancing of safety considerations against increases in production costs. *Id.* at 40-41. The Court also held that the discretionary function exception covered the actions of the Coast Guard in policing the storage and loading of the fertilizer, stating that such actions were "classically within the exception." *Id.* at 43.

After *Dalehite*, this Court did not again squarely address the discretionary function exception until *Varig Airlines*. There, the Court reviewed the language and history of the exception, and expressly reaffirmed its analysis in *Dalehite*. 467 U.S. at 808-812. The Court also specifically refuted any notion that its intervening decisions had somehow undermined the authority of that case. *Id.* at 812-813 & n.10 (discussing *Indian Towing*, *supra*, *United States* v. *Union Trust Co.*, 350 U.S. 907 (1955), and *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957)). All of those cases, the Court noted, dealt with issues other than the discretionary function exception,[14] and none of them could be read as detracting from the broad reading given that exception in *Dalehite*. *Ibid.*

In *Varig Airlines*, the Court noted two key "factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a)." 467 U.S. at 813. First, the Court reaffirmed the notion, implicit in *Dalehite*, that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Ibid.* Second, the Court observed that "whatever

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[14] With respect to *Indian Towing*, for example, the Court found it "significant[]" that "the Government *conceded* that the discretionary function exception was not implicated * * *, arguing instead that the Act contained an implied exemption from liability for 'uniquely governmental functions.'" 467 U.S. at 812.

else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.* at 813-814. That proposition, the Court held, was especially clear from the legislative history of the FTCA, which "[t]ime and again * * * refers to the acts of regulatory agencies as examples of those covered by the exception." *Id.* at 814. The underlying basis for the exception, the Court summarized, was Congress's intention

> to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."

Ibid. (quoting *United States* v. *Muniz*, 374 U.S. 150, 163 (1963)).

As in *Dalehite*, the Court's application of that test illuminated the breadth and importance of the exception, particularly in the regulatory context. In *Varig Airlines*, several groups of plaintiffs alleged, after a number of airplane crashes, that the Federal Aviation Administration (FAA) had been negligent in its inspection and certification of the aircraft in question. In applying the discretionary function exception to these claims, the Court started by noting that the FAA had chosen to carry out its statutory inspection and certification authority by means of a "spot-check" program, in which FAA inspectors had broad inspection authority but in which it was recognized that the primary responsibility for aircraft safety lay with the manufacturers. 467 U.S. at 816-819. The decision to institute such a "spot-check" regime, the Court held, easily fell within the discretionary function exception, because such decisions regarding the establishment of priorities and the balancing of enforcement goals

against staffing and funding considerations implicated "discretionary regulatory authority of the most basic kind." *Id.* at 819-820.

The Court further held that the actions of individual FAA inspectors in conducting inspections were also sufficiently "discretionary" to fall within the exception, since those employees were "empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." 467 U.S. at 820. Since the numerous mundane choices made by the inspectors involved "calculated risks" requiring judgments concerning "the advancement of a governmental purpose," the Court ruled that any alleged negligence in making those choices "falls squarely within the discretionary function exception of § 2680(a)." *Ibid.*

This Court subsequently addressed the discretionary function exception in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), a case involving claims of negligence in the approval of an oral polio vaccine. Reasoning that "discretion" necessarily entails "judgment or choice," the Court concluded that there can be no discretion where "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," thereby leaving no choice. *Id.* at 536. In other words, the discretionary function exception applies only when "the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 537.[15] At the same time, *Berkovitz* reaffirmed the rule stated in *Dalehite* and reiterated in *Varig Airlines* that "[w]here there is room for policy judgment and decision there is discretion." *Ibid.* (quoting *Dalehite*, 346 U.S. at 36).

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[15] *Berkovitz* rejected the argument that the discretionary function exception is applicable to "any and all acts arising out of the regulatory programs of federal agencies." 486 U.S. at 538. We do not make any such argument in this case.

2. *The "discretionary" actions of federal officials are immune from suit under the FTCA regardless of whether those actions are "operational"*

a. In the wake of *Berkovitz*, some lower courts have characterized the discretionary function inquiry—accurately, in our view—as requiring a two-step analysis. See *Ayer* v. *United States*, 902 F.2d 1038, 1041 (1st Cir. 1990); *Kennewick Irrigation Dist.* v. *United States*, 880 F.2d 1018, 1025 (9th Cir. 1989). First, a court must consider whether the decision in question involves "an element of choice." *Ayer*, 902 F.2d at 1041. If not, the holding of *Berkovitz* controls, and the action is outside the exception. But if the action entails an element of choice, the question then becomes "whether the decision involved the *kind* of judgment Congress intended to protect." *Ibid.* That was the central issue addressed in *Dalehite* and *Varig Airlines*, decisions the Court did not purport to question or modify in *Berkovitz*. See *Ayer*, 902 F.2d at 1041-1042; *Kennewick Irrigation Dist.*, 880 F.2d at 1024-1025.

The court of appeals here undertook the first step in that analysis. It readily acknowledged that the challenged actions of federal officials were not dictated by specific statutory or regulatory directives. The court noted that *Berkovitz* "is not dispositive" of this case ("[u]nfortunately" in its view) since "the actions of the FHLBB and FHLB-Dallas were not as closely guided by statute [as in *Berkovitz*]." Pet. App. 11a. Indeed, the court expressly noted that "[t]he authority of the FHLBB and FHLB-Dallas to take the actions that were taken in this case, although not guided by regulations, is unchallenged," and that "[t]he FHLBB and FHLB-Dallas officials did not have regulations telling them, at every turn, how to accomplish their goals for IASA." *Id.* at 12a. That conclusion—that federal regulatory agencies vested with authority to take formal actions necessarily also possess the more modest authority to use informal suasion in lieu of those formal actions—is also a sensible one.

As the Fifth Circuit explained in an earlier decision: "When a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace the management * * * it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency." *Miami Beach Federal Savings & Loan Ass'n* v. *Callander*, 256 F.2d 410, 414-415 (1958). See also *United States* v. *Philadelphia National Bank*, 374 U.S. at 330. Accordingly, there is no question in this case that the challenged actions of the federal officials were within the range of "permissible" regulatory actions. The only question is whether those actions involved the sort of judgment discussed in *Dalehite* and *Varig Airlines*.

But the court of appeals did not analyze the challenged actions in light of *Dalehite* and *Varig Airlines*. Instead, it applied a mechanical test, purportedly based on this Court's decision in *Indian Towing*, that turns on whether the allegedly tortious actions can be characterized as "operational in nature." See Pet. App. 12a-14a.[16] Since

[16] At this juncture the court of appeals also discussed at some length its prior ruling in *B & F Trawlers, Inc.* v. *United States*, 841 F.2d 626 (5th Cir. 1988), which it found distinguishable. Pet. App. 13a. This discussion in no way cures the basic flaws in the court of appeals' analysis, and indeed it further reflects the court's misapprehension of the proper approach to the discretionary function exception. The court below stated that *B & F Trawlers* was inapposite because the ruling in that case—upholding the applicability of the discretionary function exception—had rested on the proposition that in undertaking the action in question (towing a boat apprehended while smuggling illegal drugs), the United States acted with the sole purpose of protecting the general public. In this case, the court continued, the federal regulators acted with a dual purpose, and respondent was "within the pool of beneficiaries of government action here." Pet. App. 13a.

This reasoning is incorrect on two grounds. First, the court of appeals erred in its premise that respondent was an intended beneficiary of any actions of the federal regulators. On the contrary, federal regulators of financial institutions act solely for the benefit

that approach is contrary to the language and policies of the FTCA, the judgment of the court of appeals should be reversed.

b. Some courts have distinguished between "planning" and "operational" tasks for purposes of the discretionary function exception. The court below did not use that precise dichotomy; it distinguished between "policy" and "operational" activities. But the important point is that the court of appeals in this case, like several other courts, has excluded "operational" activities from the discretionary function exception even though the text of the FTCA does not. That judge-made limitation on an explicit congressional exception to the waiver of sovereign immunity is clearly unjustified.

The "operational" limitation on the discretionary function exception doubtless had its genesis in *Dalehite*, where the Court referred to the various specific decisions regarding the fertilizer manufacturing process as having been "made at a planning rather than operational level," 346 U.S. at 42. But in so doing the Court did not pur-

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of the public and the federal insurance funds, and their regulatory actions give rise to no duty of care to the regulated institutions or their shareholders. See *North Dakota* v. *Merchants National Bank & Trust Co.*, 634 F.2d 368, 379 n.20 (8th Cir. 1980); *First State Bank* v. *United States*, 599 F.2d 558, 562-564 (3d Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Harmsen* v. *Smith*, 586 F.2d 156, 157 (9th Cir. 1978); *FDIC* v. *Renda*, 692 F. Supp. 128, 135 (D. Kan. 1988) (collecting cases); *FDIC* v. *Baker*, No. SA CV 89-386, 1990 U.S. Dist. LEXIS 7559, *16-*17 (C.D. Cal. June 18, 1990).

More fundamentally, any question of whether federal regulators might or might not have had a duty of due care to respondent, Pet. App. 13a, is a matter of substantive tort law, and thus has no bearing on the logically anterior (and dispositive) issue of whether the discretionary function *exception* precludes the courts from even considering this tort claim on its merits. See p. 30, *infra*. To the extent that *B & F Trawlers* may be seen as implicitly ruling that the existence of certain types of substantive duties of care may somehow result in FTCA liability regardless of the terms of the discretionary function exception, see 841 F.2d at 632-633, such a ruling is flatly contrary to the structure of the FTCA.

port to hold that action at the "planning level" was a *sine qua non* for discretionary functions, as the remainder of the *Dalehite* opinion shows. The Court went on to hold that the Coast Guard's actions in policing the loading and storage of the fertilizer were within the discretionary function exception, without giving any indication that those activities in any sense constituted "planning" or policy-making on a grand scale. See *id.* at 42-43. *Dalehite* therefore offers no support for an "operational" limitation on the discretionary function exception.

The Court again referred to "operational" activities in *Indian Towing*, noting that the allegedly tortious actions in that case—the failure to maintain a lighthouse in proper working order—were undoubtedly "operational" in nature. 350 U.S. at 64, 68. The court of appeals in this case, like some other courts, fastened on that language to conclude that *Indian Towing* established a "distinction between policy decisions and operational actions," and that actions falling on the "operational" side of this divide necessarily also fall beyond the discretionary function exception. Pet. App. 7a, 12a-13a. See also *United States* v. *Hunsucker*, 314 F.2d 98, 103-104 (9th Cir. 1962); *United States* v. *Gregory*, 300 F.2d 11, 13 (10th Cir. 1962). But that reasoning is fallacious. This Court expressly noted in *Indian Towing* that the United States had *conceded* that the actions in question were outside the discretionary function exception. 350 U.S. at 64. We recognize, of course, that the actions in *Indian Towing* were "operational" in nature under any standard, and that (as the government also admitted in *Indian Towing*, 350 U.S. at 64) the government can be held liable for some negligent operational activities. But it is illogical to conclude that since some such operational activities are nondiscretionary, all of them are. *Indian Towing* did not set down a comprehensive definition of discretionary functions, nor did it (in light of the government's concession) even adjudicate any discretionary function question. Rather it rejected the government's distinct claim

that the performance of "uniquely governmental" functions—even if not "discretionary" in any meaningful sense—necessarily falls outside the scope of the FTCA on the ground that there are no "like circumstances" in which a "private individual" may be held liable under the Act, 28 U.S.C. 2674. See 350 U.S. at 64, 66-67. Cf. *Varig Airlines*, 467 U.S. at 815 n.12 (noting the distinction between that argument and one based on the discretionary function exception).

Indian Towing also acknowledged that the "Good Samaritan" theory of tort liability followed by many States may be applied against the federal government when it undertakes a particular function (such as operating a lighthouse) and thereby "engender[s] reliance on the guidance afforded by the light," 350 U.S. at 69, 64-65. But that issue is one of substantive tort law, which is relevant only *after* it is decided that the threshold requirements of the FTCA are satisfied and that none of the exceptions in 28 U.S.C. 2680 is applicable. That proposition is clear from the structure of the FTCA. Section 2680 provides that the Act's waiver of the government's tort immunity "shall not apply" to the listed category of claims, and an exception to a waiver of sovereign immunity necessarily bars a claim even if the elements of liability are proved. See *Dalehite*, 346 U.S. at 32 ("Congress exercised care to protect the Government from claims, *however negligently caused*, that affected the governmental functions") (emphasis added); *Kennewick Irrigation Dist.*, 880 F.2d at 1029 ("negligence is simply irrelevant to the discretionary function inquiry"). In fact, *Indian Towing* recognized that FTCA actions remain subject to the exceptions by which Congress "circumscribed" the government's liability under that statute. 350 U.S. at 67-68.

Thus, neither *Dalehite* nor *Indian Towing* supports the notion that all "operational" activities necessarily fall outside the discretionary function exception. They and other decisions bear out what should be obvious from the

text of the FTCA itself—that a mechanical exclusion of "operational" activities is not faithful to that text or to the will of Congress. The discretionary function exception is not limited to the performance of a discretionary function by a federal agency or employee acting at a planning or policy formulation level. Rather, it bars *all* claims based on the performance of "discretionary" functions. The elimination of "operational" activity would add a qualification to the exception "which simply does not appear there," 2 L. Jayson, *supra*, § 249.07, at 12-183, contrary not only to the normal canons of statutory construction, but also to the frequent admonition that waivers of sovereign immunity are to be strictly construed. See *Shaw*, 478 U.S. at 315; *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *McMahon*, 342 U.S. at 27.[17]

c. The legislative history of the discretionary function exception provides no support for an "operational" limitation. To be sure, one particular category of operational activities—the operation of motor vehicles—lay at the core of what Congress intended the FTCA to cover. See S. Rep. No. 1400, *supra*, at 31; *Dalehite*, 346 U.S. at 28 & n.20. But it does not follow that all "operational" tasks are outside the discretionary function exception. On the contrary, the specific examples that Congress used in de-

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[17] Congress recently considered and decided not to take action on a bill that would have inserted into the discretionary function exception the operational limitation imposed by the court of appeals in this case. See H.R. 3872, 100th Cong., 2d Sess. (1988) (limiting the exception to situations where "the discretionary function or duty involves the formulation of policy rather than the implementation of the policy at an operational level"); *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 10-11, 21-32, 47-56, 97-126, 199-242 (1988). As reflected in the statement of the principal congressional sponsor of this legislation, the proposed bill was clearly seen as altering the existing law established by *Varig Airlines*. See *id.* at 29-30 (statement of Rep. Owens).

scribing the exception belie any such notion. A "negligent exercise by the Treasury Department of the blacklisting or freezing powers," for instance, would quite likely occur at an operational rather than policy formulation level. See H.R. Rep. No. 2245, *supra*, at 10 (quoted in *Dalehite*, 346 U.S. at 29 n.21). Without distinguishing between "planning" or "policy formulation" on the one hand and "operational" activities on the other, Congress also said that the exception would apply to negligent actions involving "abuse of discretionary authority" by employees of regulatory agencies such as the FTC or SEC. *Ibid.*

d. The "operational" limitation adopted by the court below (and elsewhere [18]) is also contrary to the essential policies of the exception. In *Dalehite and Varig Airlines*, this Court recognized that, to serve its vital purpose, the discretionary function exception cannot be limited to "the initiation of program and activities," *Dalehite*, 346 U.S. at 35; "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813. An "operational" limitation would likely make application of the exception turn on the identity of the actor in many cases, by insulating the decisions of "planners" while holding the government liable for the actions of their "operational" subordinates, even if their actions also entailed a substantial degree of discretion.

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[18] As we noted in our petition (at 19 & n.10), the court below is not the only court of appeals that purports to adhere to this distinction, even after *Varig Airlines*. See *E. Ritter & Co.* v. *United States*, 874 F.2d 1236, 1241 (8th Cir. 1989); *United States Fire Insurance Co.* v. *United States*, 806 F.2d 1529, 1535-1536 (11th Cir. 1986) (applying discretionary function exception under Public Vessels Act, but relying on FTCA case law). See also *Caplan* v. *United States*, 877 F.2d 1314, 1319 (6th Cir. 1989) (Martin, J., concurring).

The error in the court of appeals' rule, moreover, is vividly demonstrated by the holding in *Varig Airlines*. There, the broad decision of the FAA to implement its inspection authority by means of a "spot-check" system would doubtless be recognized by all as a "planning level" or "policy formulation" decision, to which the exception easily applies. But this Court also applied the exception to the actions of individual FAA inspectors, making individual inspection decisions, because those decisions inherently entailed discretionary judgments related to underlying policy considerations. 467 U.S. at 820. Those inspection decisions were (quite literally) "nuts and bolts" decisions that had nothing whatever to do with "planning," and are best seen as "operational."

Varig Airlines should have put an end to the use of the mechanical limitation adopted by the court below. At least one court of appeals has expressly so read *Varig Airlines*,[19] and the majority of other circuits appear also to have rejected that limitation.[20] The court below, however, read *Berkovitz* as somehow reviving a policy/operational "dichotomy." Pet. App. 11a. That reading was based entirely on a single footnote in *Berkovitz*, which referred to *Indian Towing* as "illuminat[ing] the appro-

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[19] See *Begay* v. *United States*, 768 F.2d 1059, 1062-1063 n.2 (9th Cir. 1985); *Kennewick Irrigation Dist.*, 880 F.2d at 1022-1023. See also *Colorado State Bank* v. *FDIC*, 671 F. Supp. 706, 709 (D. Colo. 1987) (making the same point in the specific context of alleged negligence in the "operational" activities of FDIC in disposing of assets of failed financial institution).

[20] See *U.S. Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *Patterson* v. *United States*, 856 F.2d 670, 673-674 (1988), modified, 881 F.2d 127 (4th Cir. 1989) (en banc); *Allen* v. *United States*, 816 F.2d 1417, 1420 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1195-1196 (D.C. Cir. 1986); see also *Ayer* v. *United States*, 902 F.2d at 1041-1042 (not referring to the "operational" test as such, but adopting an approach that is consistent with the above cases).

priate scope of the discretionary function exception." *Berkovitz*, 486 U.S. at 538 n.3. But as noted above, *Indian Towing* illuminates the scope of the exception only in the limited sense of presenting one example of an unquestionably discretionary decision (whether to build a lighthouse in a particular location) and one example of conduct concededly falling outside the exception's scope (failing to maintain the lighthouse in proper working order). While that illustration offers a useful starting point, it cannot provide a comprehensive definition of activities that fall within the discretionary function exception. Still less does it establish a rule that any activity that may be classified as "operational" is, by that fact alone, outside the scope of the exception. Failing to maintain the lighthouse in *Indian Towing* fell beyond the discretionary function exception because it was not discretionary, not because it was "operational." As two other courts of appeals have expressly recognized, the reference to *Indian Towing* in footnote 3 in *Berkovitz* did not purport to undermine *Dalehite* and *Varig Airlines*.[21] Those cases still provide the definitive guide to the application of the discretionary function exception in cases, like this one, where there is no question whether government officials have violated laws or policies "specifically prescrib[ing] a course of action," *Berkovitz*, 486 U.S. at 536.

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[21] See *Kennewick Irrigation Dist.*, 880 F.2d at 1024-1025; *Ayer*, 902 F.2d at 1042. While both courts found the reference to *Indian Towing* in *Berkovitz* somewhat "confusing," both courts ultimately determined that it could not have been intended to bring about the sort of fundamental change in the law that the court of appeals in the present case supposed. As the Ninth Circuit concluded in *Kennewick*, 880 F.2d at 1024-1025:

> The *Berkovitz* reference to *Indian Towing* must be read in the context of *Dalehite* and *Varig*. A matter does not fall outside of the discretionary function exception merely because the decision to embark on an activity has already been made. Were that the case, *Dalehite* and *Varig* would be eviscerated.

e. If further reason were needed to reject an "operational" limitation, the inherent vagueness of that term and the contradictory results its use can produce would be sufficient. While many cases have used the term in this context, none that we know of has defined it with any clarity. Indeed, the only principled way the term can be used is to distinguish strictly between all planning and preparatory actions and ones that implement policies.[22] But even the cases purporting to use an "operational" test fail to do so in a consistent or principled manner. The court of appeals here, for example, branded as "operational" various actions taken by federal regulators to advise and assist IASA in an attempt to avoid the use of harsher regulatory powers, even though such "jawboning" should have been seen as a clear example of nonoperational activities, since the agencies did not have actual control of IASA's operations. See pp. 37-38, *infra*. At the same time, the court found discretion in "the decision to replace the IASA Board of Directors with FHLBB approved persons, *and the actions taken to effectuate that decision*." Pet. App. 14a (emphasis added). Such internal inconsistencies can only leave the district courts and potential litigants to guess which activities will be labeled "operational" and which ones will not. In short, as one court that has rejected any "operational" limitation has put it, such a test is nothing more than a "conclusory analytical label[]" that tends only to obscure further an already difficult area. *Gray* v. *Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).[23]

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[22] That use of the word is derived by analogy from one standard definition, involving "execution of military or naval operations in campaign and battle as distinguished from training, testing, observation." *Webster's Third New International Dictionary* 1581 (1986). Other standard definitions of the word are either clearly inapposite ("ready for or in condition to undertake a destined function") or unhelpful ("of or relating to operation or an operation"). *Ibid.*

[23] Indeed, the facts of this case confirm the artificiality of any line between policy formulation and operational implementation. As dis-

B. The Challenged Actions Of The Federal Regulatory Officials Are Typical Of The "Discretionary Functions" That Congress Excepted From Liability Under The FTCA

Because the court of appeals misread *Indian Towing* and *Berkovitz*, it did not consider whether, under *Dalehite* and *Varig Airlines*, the challenged actions of the federal regulatory officials are immune from suit under the FTCA. This Court could therefore remand the case to the court of appeals for it to address that issue in the first instance. Such a remand would be appropriate, for example, if the Court were to conclude that it is necessary for the parties to develop the factual background to the challenged actions before the discretionary function question can be resolved. In our view, however, respondent's complaint cannot survive a motion to dismiss based on the discretionary function exception, and we therefore urge the Court to resolve that issue and uphold the district court's judgment.

1. The court of appeals held that many of the actions of the FHLBB officials with respect to IASA—including any decision to merge IASA with Investex and seek a neutralization agreement, and any decisions regarding the replacement of IASA's board of directors—were covered by the discretionary function exception. Pet. App. 13a-14a. At the same time, the court held that, under its "operational" test, federal regulators "lost the protection of § 2680(a) * * * when they began to advise IASA management and participate in management decisions," Pet. App. 14a. The court of appeals therefore reversed the district court's judgment, but only with respect to paragraphs 33 through 43 of the amended complaint, J.A.

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cussed below, FHLBB offered guidance to IASA in lieu of more formal regulatory steps that were under consideration. Thus, the effective use of the sort of suasion brought to bear in a case like this is inextricably connected to the express powers of federal regulators, the direct exercise of which would unquestionably fall within the discretionary function exception.

13-17. Because respondent did not file a cross-petition challenging the dismissal of the other allegations, those paragraphs alone are relevant at this point.

Only four of those paragraphs allege that actions taken by the federal regulators were tortious.[24] One of the most striking features of those paragraphs is the extent to which they show that respondent's claims are based on *advice* given by the regulators to the new IASA management and directors installed in 1986. For example, respondent claims in paragraph 33 of the amended complaint that the federal regulators had "involved themselves in IASA's affairs" by "consult[ing] as to day-to-day affairs and operations of IASA," by "exchang[ing] information," and by "giving advice, making recommendations, urging, or directing action or procedures at IASA." J.A. 13-14. Although respondent alleges (in a conclusory fashion) that federal regulators "were not only consulted, but actually participated in management decisions," respondent makes no allegations reflecting what such "participation" possibly could have consisted of apart from the sort of advice and recommendations that the federal regulators are repeatedly alleged to have offered. IASA was a private corporation, Amended Compl. para. 6, J.A. 7-8, and the relevant paragraphs contain no allegations indicating how during the period in question federal regulators could conceivably have exercised any control over the corporation's assets or activities other

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[24] Several of the paragraphs cited by the court of appeals do not contain any actual allegations of actions by federal regulators, but set forth respondent's allegations regarding injury and causation. See Amended Compl. paras. 35-36, 38-39, J.A. 16-17. Paragraph 37 alleges only actions taken by the IASA directors, paragraph 40 contains allegations about the stockholders' 1987 action electing persons other than those who had previously been approved by FHLBB as directors, and paragraph 43 simply recites the FHLBB's denial of respondent's administrative tort claim. See J.A. 16, 17. Accordingly, the only relevant paragraphs of the amended complaint setting forth factual allegations concerning actions taken by federal regulators are paragraphs 33, 34, 41, and 42, J.A. 13-16, 17.

than by offering advice and recommendations to the existing board and management.[25] Respondent might seek to prove that the federal regulators impliedly threatened to exert more formal authority over IASA if their advice went unheeded. See Amended Compl. paras. 21 & 29, J.A. 10, 12. But as discussed below, any such claim would only reinforce the link between the alleged actions and the pursuit of regulatory policies, and the existence of this link is one of the factors bringing those actions within the FTCA discretionary function exception.

Paragraph 34 of the amended complaint focuses on various specific acts, but they too all constitute the offering of advice to IASA management. Respondent alleges, for example, that federal officials "arranged for the hiring" of a financial consultant, Amended Compl. para. 34(a), J.A. 14. But he alleges no legal authority (and we are aware of none) that the federal regulators could have exercised to take that action other than by making a recommendation to IASA management. Similarly, respondent alleges that FHLB-D officials "urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered" institution, *id.* para .34(b), J.A. 14-15; that FHLB-D officials "gave advice and made recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy," *id.* para. 34(c), J.A. 15; that FHLB-D officials "mediated salary disputes between IASA and its senior officers," *id.* para. 34(d), J.A. 15; and that FHLB-D officials "reviewed a draft complaint in litigation" and were involved in "giving

[25] In the paragraphs of the amended complaint that were not stricken, respondent frequently refers to actions of allegedly "hand-picked" officers and directors. *E.g.*, Amended Compl. paras. 33(c), 34, 34(c), J.A. 14-15. But the allegations underlying respondent's claim of liability based on the selection of these officers and directors appeared in a portion of the amended complaint, paras. 27-32, J.A. 12-13, that was stricken by the court of appeals as being squarely within the discretionary function exception. Pet. App. 14a. And, of course, the actions of these managers of a private corporation following their selection were not subject to the "direction" of federal regulators, only to their advice and recommendations.

advice, making recommendations, and directing matters related to IASA's litigation policy," *id.* para. 34(e), J.A. 15. One FHLB-D official is alleged to have exhorted IASA management to be mindful, in making its decisions, of the broad goal of preserving the FSLIC insurance fund. *Id.* para. 34(g), J.A. 15-16.

The allegations in paragraphs 34(f), 41 and 42 of the amended complaint, J.A. 15, 17, all involve alleged instances in which federal regulators are claimed to have urged state regulatory officials to take various actions regarding IASA. As discussed below, those actions (whether or not purely "advisory") fall even more clearly within the discretionary function exception.[26]

2. In determining whether the foregoing actions of the federal regulatory officials are protected by the discretionary function exception, the test is whether those actions were "grounded in social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. We submit that the foregoing actions are clear examples of precisely the type of "economic" judgments that the discretionary function exception protects.

a. FHLBB officials had to exercise a considerable degree of discretion when offering advice and assistance to IASA managers about such matters as whether to seek

[26] The federal regulators also did not act randomly. In addition to the precise character of the actions alleged, it is important to note the regulatory context in which these events arose. The background factual materials submitted to the district court flesh out that context somewhat. See pp. 5-6 note 6, *supra*. We recognize that issues such as the financial condition of IASA at various times entail factual questions that respondent might contest. But for present purposes, it is unnecessary to resolve or even address such disputed questions. We present these background matters here, as we did in the district court, simply to show that the federal "involvement" in IASA's affairs alleged by respondent did not occur in a vacuum, but came about in the course of regulatory activities and concerns. We do not understand respondent to dispute that basic proposition, but we also believe that respondent's complaint should be dismissed even if the specific regulatory context is not considered.

federally chartered status, whether to place particular subsidiaries into bankruptcy, or even whether to pursue a particular item of litigation on the corporation's behalf. As the court of appeals noted, the federal banking officials "did not have regulations telling them, at every turn, how to accomplish their goals for IASA." Pet. App. 12a. Lower courts have frequently applied the discretionary function exception to governmental decisions that would be considered purely "commercial" if engaged in by private parties. For example, in *Williamson* v. *United States Dep't of Agriculture*, 815 F.2d 368, 374-376 (5th Cir. 1987), the court recognized that decisions regarding the creditworthiness of individual loan applicants are discretionary functions in the context of a federal loan program. In *Kennewick Irrigation Dist.*, *supra*, the court held that decisions regarding the design of an irrigation canal are within the discretionary function exception, principally because of the need for government decision makers to weigh the "vital item of cost" in determining the appropriate design. 880 F.2d at 1027-1028.[27] Similarly, courts have recognized that government contracting decisions, judgments regarding trademark rights, and other commercial decisions fall within the scope of the exception. See *Gowdy* v. *United States*, 412 F.2d 525, 529 (6th Cir.) (award of contracts), cert. denied, 396 U.S. 960 (1969); *U.S. Gold & Silver Investments, Inc.* v. *Director, United States Mint*, 656 F. Supp. 380, 382-383 (D. Ore. 1987) (trademark), aff'd on other grounds, 885 F.2d 620 (9th Cir. 1989), cert. denied, 110 S. Ct. 3239 (1990); see generally L. Jayson, *supra*, §§ 249.04

[27] *Kennewick* also relied on *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). See 880 F.2d at 1029. In *Boyle*, this Court invoked the policies of the FTCA discretionary function exception in ruling that military equipment procurement decisions, which involve balancing of numerous considerations including cost, are matters with which state tort law cannot be allowed to interfere. See 487 U.S. at 511-512.

[5], 249.04[6], 249.04[7].[28] Those cases recognize that decisions affecting the public fisc "go[] to the heart of governmental activity." *Pennbank* v. *United States*, 779 F.2d 175, 180 (3d Cir. 1985) (refusal to grant loan is discretionary function). The principle that cost considerations can amount to the sort of "discretion" protected by the discretionary function exception stems from *Dalehite*, where this Court relied on such factors in ruling that various decisions about specific aspects of the fertilizer manufacturing process fell within the exception. See 346 U.S. at 40-41.

The regulatory choices facing FHLBB when it offered advice to IASA remove any doubt that the challenged activities are of the sort that Congress intended to protect from "judicial 'second-guessing' * * * through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814. As the district court in this case noted, Pet. App. 25a, a decision by FHLBB to invoke its more formal powers, such as issuance of a cease-and-desist order or placing IASA into conservatorship or receivership, would have been shielded from liability as a discretionary function.[29]

[28] Such results are also consistent with the traditional legal concept of governmental discretion, drawn from cases such as those involving mandamus, that this Court has recognized as pertinent to the FTCA exception. See *Dalehite*, 346 U.S. at 34. For example, in *Panama Canal Co.* v. *Grace Line, Inc.*, *supra*, the Court declined to review tolls set for use of the Panama Canal, on the ground that decisions setting such tolls involved discretionary choices regarding methods of accounting and cost allocation. 356 U.S. at 317-319.

[29] See *Golden Pacific Bancorp* v. *Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 109 S. Ct. 223 (1988); *Taylor* v. *FHLBB*, 661 F. Supp. 1341, 1349-1350 (N.D. Tex. 1983); *Colony First Federal Savings & Loan Ass'n* v. *FSLIC*, 643 F. Supp. at 417; *FDIC* v. *Jennings*, 615 F. Supp. 465, 467-468 (W.D. Okla. 1985); *First Savings & Loan Ass'n* v. *First Federal Savings & Loan Ass'n*, 531 F. Supp. 251, 255 (D. Haw. 1981); *Newberg* v. *FSLIC*, 317 F. Supp. 1104, 1106-1107 (N.D. Ill. 1970). See also *FDIC* v. *Carter*, 701 F. Supp. 730, 736 (C.D. Cal. 1987).

Some district courts have suggested that the discretionary function exception does not apply when the government goes beyond

The courts have also recognized the corollary that a decision by federal banking regulators *not* to take regulatory actions is similarly within the exception.[30] Decisions like these involve "innumerable subtle judgments * * * that draw upon a mix of law, accounting, bank custom, and policy," and are typical of the actions that the discretionary function exception was designed to protect. *Golden Pacific Bancorp* v. *Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 109 S. Ct. 223 (1988).

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its role as regulator and substitutes its decisions for those of a bank's officers and directors. See *FDIC* v. *Renda*, 692 F. Supp. at 136 (dictum); *In re Franklin Nat'l Bank Securities Litigation*, 445 F. Supp. 723 (E.D.N.Y. 1978). Those decisions, however, make essentially the same error as did the court of appeals in this case, *i.e.*, they suppose that application of the discretionary function exception turns on whether an agency has exercised "operative control," *Renda*, 692 F. Supp. at 136, rather than on a careful assessment of the nature of any discretion exercised. Indeed, *Franklin National Bank* misapplied this Court's decision in *Indian Towing* in the same way as did the court below. See 445 F. Supp. at 735. *Franklin National Bank* also confused the issue of whether the United States has assumed a duty upon which tort liability could be based, see *id.* at 731-735, with the issue of whether the discretionary function exception applies. As explained above, the two issues are conceptually distinct, and the arguable (or even proven) assumption of a duty says nothing about whether actions carrying out that duty are discretionary. See pp. 27-28 note 16, p. 30, *supra*.

[30] See *FDIC* v. *Mmahat*, 907 F.2d 546 (5th Cir. 1990); *Emch* v. *United States*, 630 F.2d 523, 527 (7th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F.2d 863, 870 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978); *FDIC* v. *Manatt*, 723 F. Supp. 99, 103-104 (E.D. Ark. 1989). See also *Successor Trust Committee* v. *First State Bank, Odessa*, 735 F. Supp. 708, 716-717 (W.D. Tex. 1990) (FDIC statements regarding possible buy-back of loans constitute discretionary function); *Colorado State Bank* v. *FDIC*, 671 F. Supp. at 708-709 (same, FDIC actions regarding disposition of assets of failed institution); *Magellsen* v. *FDIC*, 341 F. Supp. 1031, 1035-1037 (D. Mont. 1972) (same, FDIC delay in acting on insurance application).

The court of appeals acknowledged that FHLBB's use of informal suasion in an effort to help IASA improve its condition, rather than immediately employing more intrusive regulatory mechanisms, was an "unchallenged" aspect of the agency's broad regulatory powers. Pet. App. 12a; pp. 26-27, *supra*. What the court of appeals failed to recognize, however was that the decision to proceed in this manner, and the continuing decisions as to what sort of guidance IASA needed, were themselves highly discretionary decisions regarding the conduct of the agency's regulatory responsibilities. Another lower court, dealing with an analogous situation involving the federal regulation of airport safety, has recognized the discretionary nature of such activities:

> [T]he Secretary was acting as a governmental policy-maker in his decision to apply negotiation and diplomacy rather than legal measures. Weighing the governmental interest in insuring the most efficient use of federal funds against such remedies as closing down the airport or instituting other legal sanctions and deciding in favor of a less antagonistic approach clearly constitutes the type of discretion reflected in the history of the FTCA.

Sellfors v. *United States*, 697 F.2d 1362, 1368 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984). Similarly, FHLBB's decisions to offer advice to IASA, rather than resort immediately to sterner regulatory measures, were simply an aspect of its highly discretionary, policy-oriented judgment about "whether and how to intervene" in that institution's affairs. *FDIC* v. *Jennings*, 615 F. Supp. 465, 467 (W.D. Okla. 1985).

Accordingly, any advice and guidance FHLBB offered to IASA must be recognized as integral to its broader regulatory activities. The ultimate goal of such activities is, of course, "to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds." *Woods* v. *FHLBB*, 826 F.2d 1400, 1411 (5th Cir. 1987), cert. denied, 485

U.S. 959 (1988). Just as the FAA inspectors in *Varig Airlines* necessarily exercised their discretion "for the advancement of [the] governmental purpose" of aircraft safety, 467 U.S. at 820, the FHLBB officials whose actions are at issue here exercised their authority with an eye to the broad regulatory policies under which they operate. For example, in advising IASA managers to engage a consultant, to close a particular subsidiary, or even to file a lawsuit, the federal regulators were making judgments concerning the best way to further the regulatory goals of preserving the institution's soundness, for the ultimate purpose of safeguarding federal deposit insurance funds. Nor can it be doubted that a federal regulator's advice to an institution to convert to federally chartered status is a judgment grounded in regulatory policy. Furthermore, because all of these actions were taken in lieu of pursuing more formal regulatory actions, including receivership, federal regulators also had to consider at every juncture whether the particular actions they recommend were likely to produce beneficial results justifying the agency's continued forbearance from formal proceedings. Such decisions call for the exercise of discretion and expertise, are ultimately related to broad policy goals, and, as this Court recognized in *Varig Airlines*, are precisely the kinds of decisions that must be shielded from liability by the discretionary function exception.

The only allegations of actions by FHLBB officials other than giving advice to IASA were that FHLBB officials "actively intervened" with state regulatory bodies concerning IASA, "asked the State" to delay certain regulatory actions, and later "repeatedly requested" state officials to close IASA. Amended Compl. paras. 34(f), 41, 42, J.A. 15, 17. Any such actions, however, are even more obviously part of FHLBB's discretionary functions. Just as a federal regulatory agency's own enforcement decisions constitute highly discretionary determinations that cannot support an FTCA claim, surely an action

by a federal agency to urge state officials to exercise their discretionary authority in a particular way is also a discretionary matter, related to regulatory policies, which the courts are ill-equipped to second-guess. See *Taylor* v. *FHLBB*, 661 F. Supp. at 1349 (indicating that discretionary function exception applies, inter alia, to FHLBB request to state authorities to issue cease and desist order).

b. Although the doctrine of sovereign immunity has its roots in the historical prerogatives of the English monarchs, this Court has recognized that the doctrine has continuing vitality, and is grounded in policy considerations consonant with the principles of democratic government. See, *e.g.*, *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938). In the specific context of the FTCA, one court has identified "three principal themes" in the modern justifications for sovereign immunity, noting that each is directly pertinent to the important purposes served by the discretionary function exception. See *Gray* v. *Bell*, 712 F.2d at 511. First, separation of powers principles militate against judicial interference with discretionary, policy-based decisions of the coordinate, political branches.[31] Second, "courts should not subject the sovereign to liability where doing so would inhibit vigorous decisionmaking by government policymakers." *Ibid.* Third, "courts should be wary of creating huge and unpredictable governmental liabilities" by permitting damage claims based on policy decisions with broad impact. *Ibid.* See also *OPM* v. *Richmond*, 110 S. Ct. 2465, 2476 (1990). Each consideration reinforces the importance of recognizing the "discretionary" nature of the informal regulatory actions at issue.

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[31] Separation of powers principles have been recognized as underlying the discretionary function exception. See *Laird* v. *Nelms*, 406 U.S. 797, 812 n.11 (1972) (Stewart, J., dissenting); *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989); *Kennewick Irrigation Dist.*, 880 F.2d at 1021-1022.

Imposing tort liability on the United States based on the kinds of actions taken in this case can only hobble and confine federal efforts to deal with the current crisis affecting the savings and loan industry. Even apart from the general tendency of such tort liability to "inhibit vigorous decisionmaking" by government officials, the range of claims that would be permitted under the court of appeals' ruling would have especially pernicious effects by restricting and skewing regulatory efforts. It is widely recognized that decisions by federal regulators to invoke formal regulatory powers against financial institutions fall well within the scope of the discretionary function exception. If liability is to be imposed when federal regulators act informally to assist troubled institutions in an effort to obviate more drastic measures, the resulting incentive is clear: Regulators will be encouraged to avoid such efforts, to stand mute while the institution deteriorates, and then invoke their "discretionary" powers. Such an incentive would be perverse, given the congressionally recognized need to encourage flexible and decisive action by thrift regulators. Constriction of regulatory options "through the medium of [actions] in tort" is precisely the sort of interference with policy judgments that Congress sought to avoid by the discretionary function exception. See *Varig Airlines*, 467 U.S. at 814.[32]

Imposition of tort liability in this context, moreover, poses an extraordinarily grave danger of "creating huge and unpredictable governmental liabilities." *Gray* v. *Bell*, 712 F.2d at 511. An unprecedented number of thrifts,

[32] Moreover, the decision below, by characterizing as "operational" actions with respect to matters of an institution's basic financial integrity, has opened the door to disgruntled creditors to bring suit against the United States concerning day-to-day problems in the institution—problems that, in a time of crisis, the regulators did not and could not address in their advice. At least one such suit is pending in federal district court, *McNeilly* v. *United States*, No. CA3-88-1853-H (N.D. Tex.).

totalling at least several hundred, are now either insolvent or "troubled." See H.R. No. 54-(I), 101st Cong., 1st Sess. 294, 303 (1989). As the damage prayer in the present case reflects,[33] the amount of the financial loss in any individual thrift failure is likely to be large indeed. Taken together, these factors show that imposition of liability in cases of this sort could result in staggering financial losses to the federal government. The prospect of such losses would inevitably further chill the vigor of enforcement efforts.

Finally, the need to defer to the economic judgment of the federal banking agencies reinforces the impropriety of permitting tort claims in this area. Administrative agencies, including the FDIC and the newly created Office of Thrift Supervision, will continue to undertake the difficult day-to-day tasks of thrift regulation, tasks that require 'innumerable subtle judgments * * * that draw upon a mix of law, accounting, bank custom, and policy." *Golden Pacific Bancorp*, 837 F.2d at 512. The federal courts are ill-equipped to "second-guess" these subtle judgments, or the congressional policies upon which they are based.

[33] Although the court of appeals dismissed all but $25 million of respondent's claims, on the ground that he could not sue for the loss in value of IASA stock that he and other shareholders allegedly suffered, the total loss for which recovery was sought in this case was $100 million. Amended Compl. para. 59, J.A. 19

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1990

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* The Solicitor General is disqualified in this case.

APPENDIX

STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 2680, provides in relevant part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

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No. 89-1793

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In the Supreme Court of the United States

October Term, 1990

United States of America, *Petitioner*

v.

Thomas M. Gaubert, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether federal thrift officials are absolutely immune from tort liability under the "discretionary function" exception to the Federal Tort Claims Act for negligence in their extra-regulatory day-to-day management of a healthy thrift where such conduct does not require the exercise of public policy discretion.

2. Whether the Court should abstain from deciding the complex federal issue of immunity and instead affirm the court of appeals' judgment remanding this case for a determination whether the requirements of state law necessary to bring a claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), have been satisfied and, hence, to present squarely that federal question.

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October Term, 1990

No. 89-1793

United States of America, *Petitioner*

v.

Thomas M. Gaubert, *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

For the reasons given herein, Respondent respectfully requests that the Court affirm the judgment of the court of appeals.

STATUTORY PROVISION INVOLVED

The relevant sections of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2680, are reprinted in an appendix to this brief.

COUNTER-STATEMENT OF THE CASE

The primary issue presented by the Government's brief is whether the court of appeals correctly denied the Government's motion to dismiss paragraphs 33-43 and Count II of Respondent's amended complaint for lack of

subject-matter jurisdiction. The existence of jurisdiction in this case depends entirely upon the specific and unique nature of the challenged conduct. Those paragraphs unambiguously allege that federal officials abandoned their role as regulators and negligently managed the actual day-to-day operations of Respondent's then financially-sound thrift, causing its collapse. The Government's statement and arguments dispute these allegations and assert that those officials -- acting within the customary regulatory framework -- provided nothing more than "advice" to an already failing thrift.

The Government's statement improperly recasts this case in two respects critical to its argument on the pending motion to dismiss. First, the Government's statement contends that, owing to Respondent's own management practices, his thrift was already failing before thrift officials assumed control over its day-to-day operations. *Petitioner's Brief* ("*Brief*") at 8-10. That inaccurate contention is material to the Government's claim that thrift officials made the individual management decisions challenged here "in lieu of" of instituting formal procedures (such as a conservatorship), and those decisions are therefore entitled to share in the immunity afforded a decision to pursue formal methods.[1] *Brief* at 41-45. The necessary factual predicate for that claim squarely contradicts Respondent's allegation that IASA was financially sound before the thrift officials took control of its day-to-day operations. *Joint Appendix (J.A.)* at 16, para. 35. As those officials -- on the record before the Court -- could not have instituted formal procedures, the Government's argument proceeds from a false premise.

[1] As we will demonstrate, the Government's claim to immunity for the individual day-to-day management decisions at issue here also fails for reasons apart from its reliance upon factual matters in dispute.

Second, the Government contends that the actions taken "came about in the course of regulatory activities and concerns." *Brief* at 39 n.26. The Government thereby attempts to create the inaccurate impression that this case is no different from the now common situation in which thrift officials supervise the practices of a failing institution and argues that, by permitting suit on the alleged conduct, the Court would strike at the very heart of the federal regulatory response to problems in the thrift industry. To the contrary, Respondent alleges that the thrift officials in this case *abandoned* their role as regulators and "actually substituted [their] decisions for those of the directors and officers of the association." *J.A.* at 19, para. 35. If the factual circumstances were as the Government now contends, the very agency resolution cited by the Government in support of its claim that informal methods may be employed "in lieu of" instituting formal proceedings would have prohibited the officials' assertion of control over the day-to-day operations of Respondent's thrift. *Bank Board Resolution No. 82-381 (Res. No. 82-381)* at 2 (*Appendix* at 4a-6a). If those officials had in fact acted within their customary roles, this action would not have arisen.

The Government did not introduce, nor did the trial court admit into the record, any evidence disputing Respondent's allegations.[2] Respondent objected to the

[2] The Government draws its statement primarily from selected reports and recommendations of the very agency against which Respondent has brought this suit and is, as such, largely self-serving. Further, the administrative record drawn from was compiled in 1987. As that was over a year *after* the thrift officials' mismanagement of its day-to-day operations, those reports cannot accurately describe IASA's standing before the conduct at issue here. Moreover, both here and in submitting those materials to the district court, the Government claimed they were for "Background" only. *Brief* at 39 n.26 ("We present these background matters here, as we did in the district court, simply to show that the federal 'involvement' in IASA's

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Government's statement before both the district court and this Court. *Opp. to Mot. to Dis.*, at 2 n.1,9; *Opp. to Renewed Mot. to Dis.*, at 1-2; *Opp. to Pet. for Cert.*, at 2-3 & n.1. Neither lower court referred to, or relied upon, those extra-record representations. Accordingly, no findings of jurisdictional facts are before the Court for review and "[b]ecause the decision [the Court] review[s] adjudicated a motion to dismiss, [the Court] accept[s] all of the factual allegations in [Respondent's] complaint as true and ask[s] whether, *in these circumstances*, dismissal of the complaint [would be] appropriate." *Berkovitz* v. *United States*, 486 U.S. 531, 540 (1988) (also involving a motion to dismiss for lack of subject-matter jurisdiction) (emphasis added).

I. FACTUAL BACKGROUND

A. Respondent's Thrift Was In Sound Financial Condition Before Takeover By Federal Regulators

In 1983, Respondent acquired what became Independent American Savings Association (IASA). *J.A.* at 7, para. 6. Federal and state regulators conducted independent audits and examinations which confirmed that, through the end of 1984, IASA's assets and net worth

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[2] (...continued)
affairs alleged by respondent did not occur in a vacuum, but came about in the course of regulatory activities and concerns.") The Government's actual use of these materials belies this explanation. Rather than illuminating the context in which the federal involvement occurred, the Government improperly uses these extra-record materials to *deny* the alleged nature of that involvement. Despite Respondent's objection -- both before the district court and this Court -- to the Government's statement, the Government asserts that "[w]e do not understand respondent to dispute * * * the specific regulatory context" at issue here. *Id.* The Government finally concedes almost forty pages into its brief that the Court should disregard those materials if Respondent disputes them. *Id.* Respondent *does* dispute these extra-record materials.

grew steadily and the thrift was financially sound. *Id.* at 8, para. 8. Specifically, in December 1984, when Respondent left the thrift, IASA reported, without comment or dissent from the federal regulators, a net worth of at least $54 million. As late as 1985, shortly before the regulators took control of its day-to-day operations, the thrift was financially sound and experiencing healthy growth. *Id.* at paras 8-9.

B. Federal Regulators Require Respondent To Enter Into "Neutralization" Agreements

In 1984, officials of the Federal Home Loan Bank Board ("FHLBB") and Federal Savings and Loan Insurance Corporation ("FSLIC") were seeking to merge Investex Savings, a failing thrift, with a financially sound institution. *Id.* at 9, para. 16. Considering IASA a potential candidate, these officials approached Respondent. *Id.* at 10, para. 17. During negotiations with Respondent over the merger, the officials expressed concern about a completely unrelated loan transaction involving Respondent and an Iowa thrift. *Id.* at 9, para. 12. Rather than disapprove the Investex merger because of the unrelated Iowa loan, the officials required Respondent to sign a "Neutralization Agreement." *Id.* at 9, paras. 12-13. Under its terms, the thrift officials agreed to approve the merger provided Respondent temporarily removed himself from IASA's management during the pendency of the FHLBB's investigation of the Iowa loan. *Id.* at 9, para. 12. Federal thrift officials had never before used such an agreement, nor have they since. *Id.* at 9, para. 13.

As a condition of the merger, the officials also required Respondent -- even though prohibited from managing its operations -- to contribute capital to IASA in the form of $25 million in personal assets and to guarantee IASA's net worth. *Id.* at 9-10, paras. 14, 17. Like the rest of the agreement, the net worth guarantee

had no termination date. *Id.* at 9, para. 14. Respondent signed a second such agreement in December 1985. *Brief* at 8. At that time, IASA still had a positive net worth. *Id.* at 16, para. 35.

C. Federal Regulators Acquire Control Of IASA's Day-to-Day Management

As it turned out, the federal thrift officials forced Respondent out of his thrift at the same time it was undergoing massive growth owing to the Investex merger. Concerned about the possible detrimental effect this growth might have on IASA, these same officials -- through a two-step process -- instituted an extra-regulatory take-over of IASA, eventually substituting their decisions for those of IASA officers and directors. Again, rather than exercising formal regulatory powers -- *e.g.*, issuing a cease and desist order, appointing a conservator, or imposing a receivership -- the officials utilized unprecedented procedures.[3] *Id. at 13-16, paras. 33-34.* First, through threats and other pressure, the officials forced IASA's remaining directors and officers to resign and replaced them with their own hand-picked directors and officers. For example, IASA's new chief executive officer came from the board of the Federal Home Loan Bank of Dallas ("FHLB-Dallas") and its new chief operating officer from one of the offices in the FHLB-Dallas itself. *Id.* at 12, paras. 27, 28. Although neither had any experience in conducting the day-to-day management of a thrift, the thrift officials agreed to indemnify those individuals and the other replacement directors and officers. *Id.* at 13, para. 32.

Having placed their former associates in IASA's controlling management positions, the officials' involvement at IASA deepened to the point that they participated in, and actually directed, IASA's day-to-day technical and business operations, including:[4] negotiation

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[3] Much of the Government's argument turns upon its contention that, throughout the period in question, the thrift officials could have taken specific formal action against IASA, such as placing it into conservatorship or receivership, but rather chose to employ threats of formal action to achieve results informally. However, that argument mischaracterizes both the factual circumstances surrounding the officials' actions and the choice of procedures available to them. For example, it is inaccurate for the Government to claim that it took IASA over informally "in lieu of" placing it into receivership. Under the facts alleged -- which must be accepted as true -- IASA was sound at the time of the take-over and, therefore, the prerequisites for a conservatorship or receivership would not have been satisfied. Contrary to the Government's assertions before this Court, FHLBB manuals and resolutions permit informal procedures as a threshold step, to be taken only if the agency determines a thrift is in no serious financial trouble. *Res. No. 82-381* at 2, App. 4a-6a. Under the thrift officials' own policy and directives, "informal" methods cannot be viewed as functional equivalents of "formal" procedures. Instead, if IASA was experiencing financial problems serious enough to

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[3] (...continued)
warrant a conservatorship or receivership, the officials could not have continued with their so-called informal suasion.

[4] Although Respondent filed this case over three years ago, he has not been permitted *any* discovery. As a result, the list of individual management decisions made by the federal thrift officials is not exhaustive, nor can it be. Once Respondent has conducted discovery, he will be able to present in full detail the day-to-day involvement of those officials. It warrants noting that in both *Dalehite* v. *United States*, 346 U.S. 15 (1953) and *United States* v. *S.A. Empresa De Viacoa Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), the Court had the benefit of an extensive trial record in addressing the complex issues raised by the Government's assertion of the discretionary function exception. Further, in *Berkovitz* v. *United States*, 486 U.S. 531, 545 (1988), the Court remanded the only claim to immunity not dependent solely upon an examination of the applicable regulations for further factual development. If the Court here should find that Respondent's allegations -- which clearly satisfy the notice pleading requirements of Fed. R. Civ. P. 8 -- leave some matters regarding the nature of the conduct at issue unanswered, the Court should follow its salutory practice in *Berkovitz* and remand the case so that Respondent will have a fair opportunity to develop the record.

of the new officers' salary and employment conditions; mediation of salary disputes; selection of financial and other consultants; conversion of IASA from a state- to a federally-chartered thrift; placement of one of IASA's subsidiaries in bankruptcy; first prohibition and then authorization for IASA to initiate certain litigation; substitution of the regulators' decisions for those of directors at IASA board meetings; and prevention of state regulatory assistance to IASA. *Id.* at 13-16, paras. 33-34. Eventually, these officials became the *de facto* decision-makers for IASA's daily operations. *Id.* at 11, para. 23.

After being at the helm of IASA for six months, the FHLB-D appointed management announced that IASA's net worth dropped from a positive $54 million to a negative net worth of over $400 million. *Id.* at 8, 16, paras. 9, 36.

II. PROCEEDINGS BELOW

A. District Court. In April 1988, Respondent brought this tort action, asserting causes of action based on the thrift officials': (1) negligent selection of IASA's replacement officers and directors; and (2) negligent management of IASA's day-to-day operations following the extra-regulatory takeover. As to both claims, Respondent alleged damages of $100 million -- $75 million for the lost value of his IASA shares and $25 million for loss of the additional capital he contributed to IASA under the net worth guarantee. The Government moved to dismiss, arguing first that only IASA itself -- not Respondent -- could assert these claims, and second that Respondent's claims fell within the "discretionary function" exception to the FTCA, 28 U.S.C. 1346(b), 2680, and were barred by sovereign immunity. *Motion to Dismiss* at 24-28. As the immunity claim depends entirely upon the conduct involved, that portion of the

Government's motion turned on the substance of Respondent's allegations.

As it has done here, the Government prepared its own factual statement that portrayed the conduct of the federal thrift officials in a manner qualitatively different from that contained in Respondent's amended complaint. *Id.* at 5-20. First, the Government disputed that IASA was financially sound before federal thrift officials became involved. Second, contending that those officials exercised only a minimum of supervision, the Government's statement disputed Respondent's allegations that thrift officials took over IASA's day-to-day operations and actually substituted their decisions for those of their hand-picked officers and directors on matters requiring only technical and business expertise. *Id.* The Government did not introduce any evidence into the record to support its version of the facts. Instead, the Government referred to portions (*viz.*, its own internal memoranda) of the administrative record underlying the FHLBB's decision to place IASA into receivership in May *1987*, well over a year *after* these officials assumed control.[5] Although the Government claimed that the "'Background' section merely describes the discretionary acts taken," it nevertheless asserted that the "Court cannot 'second guess' those actions." *Id.* at 32. It is clear that the Government in fact intended to dispute the substance of his allegations with these extra-record materials, and Respondent objected to their use. *Opp. to Mot. to Dis. at 2 n.1, 9; Opp. to Renewed Mot. to Dis. at 1-2.* The Government did not respond with a motion to introduce the materials into the record.

The Government alternatively argued that federal thrift officials are entitled to absolute immunity. *Reply*

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[5] As such, these materials reflect the financial condition of IASA *after* both the Investex merger (engineered by the federal thrift officials) and those officials' mismanagement of the thrift's day-to-day operations.

Brief at 4-6. The Government asserted that the officials' "powers permit them to forcefully involve themselves in the day-to-day operations of the associations they regulate." *Id.* at 4. "There simply is no such thing in the thrift regulatory context as a decision to regulate on the one hand and a decision to take over the management of a thrift on the other." *Id.* The Government concluded that the "discretion to regulate in this context is the discretion to do so thoroughly, even to the point of controlling and influencing the day-to-day operation of an association." *Id.* at 5 n.6. Under the Government's theory, any and all actions of agency officials ostensibly taken in respect of a thrift -- including individual management decisions following an extra-regulatory take-over -- fall within the discretionary function exception. No actions those officials might take would ever give rise to liability -- making them absolutely immune.

On September 28, 1988, the district court granted the Government's motion. Confining its attention to his amended complaint -- the only document of record -- the court accepted Respondent's factual allegations as true: "Essentially, Plaintiff argues, the Agencies went beyond their normal regulatory role by participating and becoming the *de facto* decision-makers for the operations of IASA." *Appendix to Petition for Certiorari ("Pet.App")*. at 24a. Without analyzing the nature of the individual day-to-day management decisions alleged -- the core consideration governing its application -- the court indiscriminately swept those decisions into the discretionary function exception. The court reasoned that, because the decision not to place IASA in receivership would have fallen within the exception, so too did each of the negligent management decisions. *Id.* According to the court, then, management of IASA's day-to-day operations was "an *extension* of the Agencies' discretion not to place IASA in receivership in 1984." *Id.* at 25a (emphasis added). The court, therefore, -- without

citation to *any* authority or reliance upon the principles the Court has articulated -- employed a simple expedient that effectively afforded federal regulators absolute immunity for any and all acts taken in respect of a thrift: "[A]cts taken in extension of a discretionary function fall in the safety net created by the discretionary function exception, and are not actionable." *Id.* at 26a.

B. Court of Appeals. Contrary to the indiscriminate approach of the district court, the court of appeals disposed of the case on state law grounds. Holding that "Texas law does not permit [Respondent] an individual cause of action" cognizable under the FTCA for the diminution in value of IASA shares, the court dismissed his $75 million stock claim. *Pet.App.* at 19a. The court also remanded Respondent's $25 million claim -- based on the net worth guarantee -- with instructions that the district court determine whether the thrift officials' mismanagement of IASA gave rise to a "personal cause of action." *Id.*

Going beyond the court's holding is its thorough discussion of the Court's decisions applying the "discretionary function" exception. Quoting *Varig*, the court first acknowledged that the central policy behind the exception is "Congress['s] wish[] to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 8a-9a. Citing *Berkovitz*, the court then discussed the "two distinct strands of conduct to which the discretionary function exception does *not* apply." *Id.* at 11a. (emphasis added).

"[F]irst are cases where the official is acting pursuant to statute, and therefore has no real discretion, as her actions are pre-ordained by Congress." *Id.* at 11a-12a. Again citing *Berkovitz*, the court observed that the fact that "officials [do] not have regulations telling them at

every turn, how to accomplish their goals * * * does not automatically render their decisions discretionary and immune from FTCA suits." *Id.* at 12a. Rather, "*[o]nly policy oriented decisions enjoy such immunity.*" *Id.* (emphasis added) (citations and footnotes omitted). Hence, "the second type of conduct not encompassed by the discretionary function exception are those actions which are taken outside of the strictures of statutory or regulatory mandates," and which are not "policy oriented." *Id.*

The court then applied the *Varig/Berkovitz* principles to "the factual allegations of [Respondent's] complaint to determine at which point the federal officials lost their Sec. 2680(a) immunity."[8] *Id.* at 13a. Carefully

[8]The Government states that: the "court of appeals' key holding was that certain actions taken by federal thrift officials fell outside the * * * exception because they were *operational* in nature." *Brief* at 18 (emphasis added). It also devotes a considerable portion of its brief arguing against an "operational limitation" to the exception. *Id.* at 26-36. The Government mischaracterizes the court's analysis. The court first determined that an act did not rest upon public policy judgment -- as required by *Varig* and *Berkovitz* -- before classifying it as "operational." A court's use of the term "operational" would be objectionable only if it reflects that the court's analysis turned solely upon the *level* in the employment hierarchy occupied by the actor involved. Such an analysis would run afoul of the Court's holdings in *Varig* and *Berkovitz* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the [exception] applies." *Berkovitz, 486 U.S. at 536;* Varig, 467 U.S. at 813. The court of appeals did not use the term in that sense, but employed it "as a shorthand reference to the limitation of the section 2680(a) exception to *policy* judgments -- a limitation reflected not only in *Varig*, but also in cases which preceded *Varig*, such as *Dalehite* * * * and *Indian Towing* * * * and in cases which followed it such as *Berkovitz*." *Camozzi* v. *Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 291 (9th Cir. 1989) (emphasis added). In fact, every act alleged in Respondent's amended complaint occurred at the *same* employment level. For example, the same officials made the decision to replace directors and officers of IASA (a protected decision) and the decision as to the amount of their salaries (an actionable

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weighing the factual circumstances surrounding the challenged conduct of the federal thrift officials, the court observed that many allegations -- *e.g.*, merging IASA with Investex and replacing IASA's board of directors -- fell within the exception. *Id.* at 14a. The court noted, however, that the officials' actions lost their "policy oriented" character "and thus lost the protection of [sec.] 2680(a)[:]"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in [paras.] 33-43 of the Amended Complaint.

Id. Accordingly, the court stated that those portions of Respondent's amended complaint alleging that the officials controlled IASA's actual day-to-day operations and, therefore, Count II would be actionable if Respondent establishes a personal cause of action under Texas law.

SUMMARY OF ARGUMENT

The court of appeals correctly held federal thrift officials accountable under the FTCA for their mismanagement of IASA's day-to-day operations. The FTCA "broadly" waives the harsh judicial doctrine of sovereign immunity, providing a remedy for the negligent acts of federal officials at all levels of the

[8](...continued)
decision). Had the court actually used an operational limitation of the mechanical nature the Government now suggests it did, it could not consistently have dismissed over two-thirds of those allegations while finding the remainder actionable.

Government. Contending that this case presents a challenge to ordinary regulatory activities, the Government asserts that the mismanagement of Respondent's thrift falls within a limited exception to the FTCA, the "discretionary function" exception. Congress, however, reserved that exception for challenges to the wisdom of the public policy underlying a regulatory program, and the Court, acknowledging the limited reach of the exception, has uniformly restricted its application to conduct grounded in public policy judgment. Such *policy* judgment -- unlike the individual day-to-day management decisions at issue here -- uniquely implicates the goals and feasibility of a regulatory program or the degree to which an agency monitors efforts of private individuals to comply with federal requirements. Accordingly, the exception applies only if the suit alleges "negligence in policies or plans," and does not protect the individual acts challenged here, the alleged negligence of which exists apart from any embodiment of program directives and policies. *Dalehite* v. *United States*, 346 U.S. 15, 36-7 n.32 (1953).

The court of appeals' comprehensive analysis of Respondent's amended complaint -- the sole relevant pleading -- demonstrates that none of the predicates justifying immunity are present here. Regulations and policies did not dictate any of the challenged actions federal thrift officials took once they assumed control of IASA's day-to-day operations. The alleged actions therefore fall outside the Court's holding in *Dalehite* that the exception immunizes conduct in accordance with program directives. Nor did those regulations specifically empower individual thrift officials to exercise *public* policy judgment in making decisions as to IASA's day-to-day operations. Indeed, those officials acted outside federal regulatory policy in controlling IASA's day-to-day operations. The alleged conduct is therefore beyond the Court's decision in *Varig* that conduct grounded in an express delegation of policy-making

authority falls within the pale of the exception. The court of appeals correctly concluded that, once substituting their decisions on IASA's actual day-to-day operations for those of the thrift's directors and officers, federal officials abandoned their role as regulators and crossed the boundary marking protected from non-protected conduct.

The Government does not -- and cannot -- successfully characterize Respondent's remaining claim as a public policy challenge within the discretionary function exception. First, the Government contends that, because decisions about thrift operations involve economic *considerations*, they must also rest upon public economic *policy*. This position disregards the Court's acknowledgement in *Berkovitz* and the holdings of lower courts that conduct based upon technical and professional judgment falls outside the scope of the exception. Further, as every agency decision implicates economic considerations, this broad proposition -- also contrary to *Berkovitz* -- would make any "element of choice" the *sine qua non* of public policy judgment.

Alternatively, the Government urges the Court to adopt the district court's holding that any action taken in "extension" of a protected action is -- *necessarily* -- protected as well. Such an analysis flatly contradicts the Court's clear pronouncement that each instance of conduct must be examined independently to determine if it rests upon public policy judgment and, instead, bases application of the exception on whether the act arose in the course of a regulatory program. The Court held in *Berkovitz* -- and illustrated by reference to *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) -- that no act warrants immunity solely by virtue of the fact that it was taken in the implementation of a protected policy decision. *Berkovitz*, 486 U.S. at 538-39. On the facts of *Indian Towing*, the discretionary function exception protected the Government's initial decision to build and maintain a lighthouse (resting upon public policy

judgment), but *not* the subsequent negligent operation of the lighthouse (resting on engineering and technical judgment).

Accepting the Government's argument would afford thrift officials *absolute* immunity, a result inconsistent with the express terms of the FTCA, its legislative history, and the Court's pronouncements. The Government's analysis provides no basis for distinguishing protected from non-protected conduct and abandons the Court's conduct-related test in favor of a mechanical test affording blanket immunity to thrift officials. That is, to dismiss the remaining Count of Respondent's amended complaint on the Government's theory, the Court must hold that, *as a matter of law*, no degree of involvement by individual federal officials in the actual running of a private business can form the basis of a negligence suit. The Court has, however, steadfastly rejected similar requests of the Government for absolute immunity. *See, e.g., Berkovitz*, 486 U.S. at 538-39 (exception does not preclude liability for "any and all acts arising out of the regulatory programs of federal agencies").

The wide-ranging latitude guaranteed thrift regulators by the court of appeals dispels the Government's suggestion that the decision might prejudice the federal regulatory response to the problems now facing the savings and loan industry. The court dismissed over two-thirds of Respondent's allegations as within the exception and has clearly protected any arguable discretionary functions involved. Moreover, the court's decision has not created, nor does it threaten to create, a flood of litigation challenging thrift regulatory decisions. The conduct challenged here is unprecedented. The only "other" case identified by the Government involves the very same S&L and the *precise* facts alleged here: only the plaintiff is different. Further, specifically recognizing the inappropriateness of many of the FHLBB's actions described in this case, Congress eliminated that agency and greatly limited the authority

of its successor. Many of the actions challenged here *cannot* occur today. Finally, because the court of appeals disposed of this case on state law grounds and the federal issue presented in this case depends upon a particular construction of state law, the Court should follow its salutory practice in similar cases and abstain from deciding the federal issue unless, and until, squarely presented.

ARGUMENT

THE NEGLIGENT MANAGEMENT OF IASA'S DAY-TO-DAY OPERATIONS FALLS OUTSIDE THE DISCRETIONARY FUNCTION EXCEPTION

A. The Discretionary Function Exception Does Not Apply To Conduct Appropriately Involving Only Business Judgment And Technical Expertise

The discretionary function exception applies only to claims that challenge the public policy underlying a regulatory program, not to claims -- such as that brought here -- alleging negligence on the part of individual government employees, where that negligence exists apart from the policies and directives of the program.

1. The FTCA Embodies A Broad Waiver Of Sovereign Immunity. The FTCA, enacted in 1946, broadly waives the Government's sovereign immunity, granting individuals a right of recovery for the torts of federal employees if a private person would be liable under similar circumstances. *See, e.g., Berkovitz*, 486 U.S. at 535 ("broad waiver"); *Indian Towing*, 350 U.S. at 68 ("designed to * * * compensate the victims of negligence in the conduct of governmental activities"), *Dalehite*, 346 U.S. at 31 ("example of the progressive relaxation * * * of the rigor of the immunity rule"). "Congress used neither intricate nor restrictive language in waiving the

Government's sovereign immunity." *United States* v. *Muniz*, 374 U.S. 150, 152 (1963). Rather, the Act plainly "provides much-needed relief to those suffering injury from the negligence of government employees." *Id.* at 165. Further, Congress intended the waiver to reach officials at all levels of the Government. "[T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and *to establish novel and unprecedented governmental liability*." *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319 (1957) (emphasis added).

The Court has also acknowledged that the FTCA "was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work," *Dalehite*, 346 U.S. at 24; and has, accordingly, understood its purpose to be "broad and just." *Indian Towing*, 350 U.S. at 68. Recognizing "the hardships caused by sovereign immunity," the Court has consistently refused "[to] narrow the remedies provided by Congress."[7] *Muniz*, 374 U.S. at 165-66; *Rayonier*, 352 U.S. at 320 ("There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.")

[7] The cases cited by the Government for a narrow reading of the FTCA either do not address that statute, *McMahon* v. *United States*, 342 U.S. 25, 27 (1951) (statute of limitations under the Suits in Admiralty Act); *Library of Congress* v. *Shaw*, 478 U.S. 310, 319 (1986) (Title VII does not separately waive federal government's traditional immunity from paying interest on damage awards); or inaccurately characterize the Court's actual holding. *United States* v. *Kubrick*, 444 U.S. 111, 117-18 (1979) ("[W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended. • • • *Neither, however, should we assume the authority to narrow the waiver that Congress intended.*") (citations omitted) (emphasis added).

2. Congress Allowed Only Limited Exceptions To The Waiver Of Immunity. In enacting the FTCA, Congress provided only a very limited number of exceptions to the general waiver of sovereign immunity. Each exception (aside from the discretionary function exception) grants blanket or absolute immunity from tort liability based either on the identity of the agency or a classification of the act involved.[8] Congress also granted status-related immunity to a few federal instrumentalities whose activities affect this Nation's financial system.[9] Congress deliberately elected *not* to exempt federal regulatory agencies, including those -- such as the FHLBB -- whose activities also affect that system.

3. By Its Terms And Legislative History, The "Discretionary Function" Exception Is Limited To Conduct Grounded In Public Policy Judgment. The FTCA does not define a "discretionary function," and despite the over twenty-years of Congressional debate surrounding the FTCA, the legislative history of the exception is very scant and inconclusive. The "legislative history [does] indicate[] that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within the scope of

[8] The Tennessee Valley Authority and the Panama Canal Company are examples of status-dependent exemptions. *Appendix* at 1a-3a. Examples of exceptions immunizing an entire range of actions are those for claims arising out of combatant activities, the loss or negligent transfer of mail, claims arising out of the collection of tax and the detention of goods, and the imposition of a quarantine. *Id.*

[9] The FTCA excepts the Treasury (for claims arising out of its "fiscal operations"), "a Federal land bank," "a Federal intermediate credit bank," and "a bank for cooperatives." *Appendix* at 1a-3a.

[their] business, it was not contemplated that the Government should be subject to liability arising from acts of a *governmental nature or function*. Section 2680(a) draws this distinction." *Dalehite*, 346 U.S. at 27-8 (emphasis added). In short, Congress did not desire to "extend a Tort Claims Act into the realm of the validity of • • • discretionary administrative action." *Id.* at 29 (emphasis added).

Nevertheless, "the relevant legislative materials demonstrate that the exception was designed to cover *not* all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature." *Berkovitz*, 486 U.S. at 538 (emphasis added). Congress reserved the exception for conduct so intertwined with public policy judgment that a challenge to that conduct presents a direct challenge to the program itself, as opposed to the reasonableness of the individual actor's conduct viewed apart from the goals and validity of the program. *Id.* Thus, "the common-law torts of employees of regulatory agencies would be included within the scope of the bill [*i.e.*, the FTCA] *to* the same extent as torts of nonregulatory agencies." H.R.Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945).

Accordingly, the discretionary function exception precludes only a tort suit that -- in essence -- challenges the regulatory program itself as opposed to the negligent conduct of individual government employees. Congress thereby preserved the Government's immunity for the formulation of statutory or regulatory policy. Underlying Congress' enactment of the exception, then, was the intent to protect the Government against broad-based challenges to a regulatory program, *not* a desire to deprive an injured citizen of recovery when that injury can be traced to the negligence of specific government employees. As such, the exception does not apply to conduct -- as that alleged here -- grounded in

professional and technical judgment."[19] In short, the discretionary function exception exempts the Government from liability only in circumstances in which the issue is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. *Berkovitz*, 486 U.S. at 539; *Dalehite*, 346 U.S. at 36-7 n.32.

4. The Court Has Uniformly Restricted Application Of The Discretionary Function Exception To Public Policy Decisions. Consistent with this distinction articulated in the legislative history, the Court has uniformly limited application of the discretionary function exception to conduct grounded in public policy judgment. *See, e.g.*, *Berkovitz*, 486 U.S. at 539 ("applies only to conduct that involves the permissible exercise of policy judgment"); *Dalehite*, 346 U.S. at 28 (only those actions "of

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[19]The Court's exhaustive analysis in *Dalehite* of the legislative history underlying the exception reaches precisely that conclusion:

> This is a highly important exception intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, *where no negligence on the part of any Government agent is shown*, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.

Dalehite, 346 U.S. at 29 n.21 (*quoting* Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., at 33) (emphasis added).

Indeed, the Ninth Circuit -- in a post-*Berkovitz* decision cited by the Government -- followed this reasoning in holding that decisions relating to the *design* of an irrigation canal fell within the exception, while decisions related to its *construction* did not. The court found the latter decisions -- even though partially involving cost considerations -- to rest upon engineering and professional judgment. *Kennewick Irrigation District* v. *United States*, 880 F.2d 1018, 1031 (9th Cir. 1989). As the court of appeals found here, this case too has the same kind of protected (what to do with IASA) and unprotected (how to actually run IASA) actions.

a *governmental* nature or function"). The exception, therefore, "'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Varig*, 467 U.S. at 808. In marking that boundary, "it is the nature of the conduct rather than the status of the actor that governs." *Id.* at 813.[11] If the manner and method of decision-making rests on technical and professional judgment -- as it does here -- the exception does not apply. *Berkovitz*, 486 U.S. at 545.

The Court first addressed the discretionary function exception in *Dalehite*, holding that conduct in conformity with program specifications and directives -- themselves clearly grounded in public policy judgment -- is immune from suit under the exception. Construing the exception to cover only conduct intertwined with the policy-making function of government, the Court observed that only "[w]here there is room for *policy* judgment and

[11]The Government ostensibly agrees with the fundamental precepts that (1) application of the exception turns upon the "nature of the conduct rather than the status of the actor;" and (2) only conduct grounded in public policy falls within the exception. *Brief* at 26. The Government, however, contradicts the facts pleaded to force the professional and business judgment at issue here under the public policy rubric and, alternatively, urges the Court to hold that any act taken in extension of a protected decision necessarily shares in that protection. In an effort to make the former argument more palatable, the Government improperly disputes Respondent's allegations that the thrift officials abandoned their role as regulators and actually substituted their decisions for those of IASA's management as to the thrift's day-to-day operations. The Government asserts that -- acting within the customary regulatory framework -- those officials merely offered advice to IASA. Either argument inevitably leads to a mechanical test that contradicts the very precepts from which the Government contends the test is derived.

decision there is discretion."[12] *Id.* at 36 (emphasis added). Accordingly, "[i]n interpreting the exceptions to the generality of the grant, courts [may] include *only those circumstances which are within the words and reason of the exception*." *Id.* (emphasis added).

Equally important, the Court articulated a principled distinction between protected and non-protected conduct that has consistently guided subsequent decisions, both of this and the lower courts. If a suit alleges "negligence in policies or plans," the exception applies and a damage suit "cannot [be] support[ed]." *Id.* at 36-7 n.32. Such a suit challenges the social and political wisdom of a "governmental function," and, if permitted, would restrict executive discretion. If, however, a suit alleges "individual acts of negligence" -- as does Respondent's claim -- where the alleged negligence is identified apart from the validity of the program itself, *id.* at 23; the exception does not apply and the FTCA provides a remedy.

The plaintiffs in *Dalehite* brought a wide-ranging challenge to a government program designed to ensure the production and shipment of fertilizer to Europe following World War II. A cabinet-level decision initiated the program, *id.* at 38; and "executives or administrators * * * establish[ed] plans, specifications [and] schedules of operations." *Id.* at 35-6.

[12]The Government suggests that this passage indicates the Court's willingness to hold that any act involving judgment based on economic *considerations* would involve *policy* judgment within the terms of the exception. *Brief* at 41. Such a reading would effectively make the exception apply to *any* act involving an element of judgment and, thereby, cause the exception to swallow the rule. The Court's analysis in *Berkovitz* makes clear that an element of judgment is a necessary but not dispositive condition for application of the exception. *Berkovitz*, 486 U.S. at 537. "The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of *public* policy."

Administrators detailed those specifications and schedules to the point of prescribing the exact temperature for bagging the fertilizer, the amount and type of additives to prevent clumping during shipment, and the manner of labelling bags of the fertilizer.[13] *Id.* at 39. Two shiploads of the fertilizer exploded during loading, destroying an entire harbor town, and causing hundreds of millions of dollars in property and personal injury damages.

"[T]he plaintiffs claimed negligence, *substantially on the part of the entire body of federal officials and employees involved in [the] program* of production of the material." *Id.* at 18 (emphasis added). The Court specifically

[13] Contrary to the Government's suggestions, this holding is inapposite to the facts presented here. The court of appeals held -- and the Government does not dispute -- that "FHLBB and FHLB-Dallas officials were not acting pursuant to statute when they acted to assume operational control of IASA" and "did not have regulations telling them at every turn, how to accomplish their goals for IASA." *Pet. App.* at 11a, 12a. The conduct challenged here did not, therefore, occur in compliance with agency directives and falls outside the holding of *Dalehite*. Nor is it surprising that applicable regulations and policy directives did not plot a course for the thrift officials' day-to-day operations of IASA. First, agency directives simply did not contemplate the take-over of a thrift's day-to-day operations outside a formal conservatorship or receivership (and the attendant protections for thrift's shareholders). *Res. No. 82-381* at 2, *Appendix* at 4a-6a. Under those directives, if a thrift's financial condition were sufficiently imperiled to warrant day-to-day intervention, thrift officials were required to seek formal remedies. Even then, in a conservatorship or receivership, thrift officials would not control the day-to-day operations of the thrift. In the former, some third party would operate the thrift. In the latter, the thrift would be liquidated or sold. Furthermore, IASA's alleged sound financial condition at the time precluded the agency from successfully seeking the institution of such formal proceedings. Indeed, the unprecedented nature of Respondent's claim arises from the fact that the thrift officials acted outside the roles prescribed by their own policies. As thrift management does not call for public policy judgment -- but rather involves the exercise of professional and business expertise -- no need existed for regulatory specifications of the type found in *Dalehite*.

observed that "*no individual acts of negligence could be shown.*" *Id.* at 23 (emphasis added). Rather, each stage of the program challenged was "performed under the direction of a plan developed at a high level under the delegation of plan-making authority * * * *." *Id.* at 40. In short, "[e]ach of these acts looked upon as negligence was directed by this Plan." *Id.* at 39. Accordingly, (and quite unlike Respondent's claims here) the plaintiffs' suit reduced to a challenge to the social wisdom of the decisions determinative of the very nature of the program itself.

Once finding the plaintiffs' claims presented no more than a challenge to the public policy choices defining the program itself, the Court easily found the conduct in question protected by the discretionary function exception. The Court first held that "the initiation of the program[]" fell within the exception. *Id.* at 36. The Court then held that the exception "also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." *Id.* at 36 (emphasis added). The common denominator of each such protected act was "an exercise of judgment, requiring consideration of a vast spectrum of factors,[14]

[14] The Government attempts to derive from Dalehite support for its position that any decision involving cost consideration amounts to a public economic policy decision within the exception. *Brief* at 40-41. In doing so, the Government slips into the unreflective analysis it attempts to ascribe to the court of appeals -- viz., considering the *level* at which conduct occurs as the sole and dispositive factor in determining whether immunity attaches. It is true, of course, that the Court in *Dalehite* extended protection, for example, to the choice of the coating for the fertilizer. Under customary business circumstances such a "nuts-and-bolts" decision -- as the individual management decisions challenged here -- would not involve any measure of public policy judgment. The court in *Dalehite* specifically acknowledged, however, that each such "nuts-and-bolts" decision in that case was dictated by program specifications adopted by agency administrators after balancing *programatic* concerns and goals -- *viz.*,

(continued...)

including some which *touched directly [upon] the feasibility of the fertilizer program*." *Id.* at 40 (emphasis added.)

The Court addressed another claim of negligence in program policy in *Varig*, holding that the discretionary function exception permits an agency to delegate limited policy-making authority to lower-level employees without a loss of protection under the exception. Again stressing that policy-making was the touchstone of immunity, the Court reaffirmed the fundamental principles articulated in *Dalehite* governing application of the exception:

> [I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case * * * *. Thus, the basic inquiry * * * is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability.

Varig, 467 U.S. at 813. And again, the Court acknowledged that the underlying basis of the exception was Congress' wish to prevent "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy * * *." *Id.* at 814.

In *Varig*, the plaintiffs alleged that the FAA had negligently adopted and implemented an airworthiness compliance review process, as a result of which two

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[14] (...continued)
expeditiously providing affordable, high quality fertilizer to war-torn Europe -- and therefore reflected public policy judgment. The day-to-day management decisions Respondent challenges here are quite different. First, far from being dictated by FHLBB program specifications they occurred *outside* the permissible realm of choice afforded thrift officials by FHLBB policy directives. Second, those decisions related solely to IASA and a challenge to them in no way entails a challenge to the FHLBB regulatory program.

airplanes caught fire, killing most of the passengers. Under its regulations, the FAA does not directly test compliance with minimum safety requirements before certifying either a "design" of aircraft for production or a particular plane for service. Rather, the FAA had adopted a "spot-check" program to monitor the efforts of aircraft manufacturers to comply with such standards.

The Court first held that the establishment of the "spot-check" system fell within the discretionary function exception, because it represented a policy determination as to how "best [to] 'accomodat[e] the goal of air transportation safety and the reality of finite agency resources.'" The Court then stated that the exception also protected "the acts of FAA employees in executing the 'spot-check' program," because under that program those employees "were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Id.* "Thus, the Court held the challenged acts protected from liability because they were within the range of choice accorded by federal policy and law and were the results of policy determinations."[15] *Berkovitz*, 486 U.S. at 538.

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[15] Acknowledging the breadth of the plaintiffs' challenge, the Court observed that "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Id.* at 819-20. The Government attempts to characterize the decision of thrift officials to exercise control over IASA's day-to-day management as a protected policy decision regarding the extent to which to "regulate" the thrift. The day-to-day management of a specific thrift, however, is not analogous to the programatic "compliance review" process at issue in *Varig*. *Id.* at 819. As the court of appeals concluded, the thrift officials *abandoned* their role as regulators when they assumed IASA's day-to-day management. First, FHLBB policy did not even contemplate that sort of federal involvement in a healthy thrift. *Res. No.* 82-381 at 2, Appendix at 4a-6a. The unprecedented (continued...)

The Court recognized the claim in *Varig* as a direct challenge to the political and administrative policy underlying the "spot-check" program itself, not to individual acts of negligence. In fact, the Court specifically noted that "there is no indication that either [aircraft] • • • was actually inspected or reviewed by an FAA inspector." *Varig*, 467 U.S. at 814. The Court framed the issue presented as whether "the negligent failure of the FAA to inspect certain aspects of aircraft type design *in the process of certification* gives rise to a cause of action against the United States under the Act." *Id*. at 815 (emphasis added). Distilled to its essence, then, the plaintiffs' challenge was to the "FAA's decision to certify the airplanes without first inspecting them."[16] *Berkovitz*, 486 U.S. at 537.

The Court's unanimous decision in *Berkovitz* again emphasized that "[t]he exception, properly construed, • • • protects only government actions and decisions based on considerations of *public policy*." *Berkovitz*, 486 U.S. at 537 (emphasis added). Unlike *Dalehite* and *Varig*, the claims in *Berkovitz* rested upon individual acts of negligence, not a challenge to the policy underlying the regulatory program itself. Occurring within the context of a regulatory program, those acts were taken -- as

[15] (...continued)
nature of the officials' conduct here further attests to their departure from any conduct arguably construable as "regulating" IASA. Second, *none* of the formal statutory procedures -- including a conservatorship or receivership -- actually permit thrift officials actually to operate a thrift. In no way, then, can the officials' actions in managing IASA be viewed as programatic "regulation."

[16] The proper analogy to this case would be if *Varig* involved alleged negligence in an *actual* inspection conducted under the "spot-check" program. Such a case, as the issue here, would require the Court -- as it did in *Berkovitz* (see discussion, *infra*) -- to determine whether the method and manner of inspection at issue involved the exercise of engineering and technical judgment (as it most surely would) or public policy judgment.

were the individual management decisions at issue here -- in extension of a protected discretionary decision. The Court firmly rejected, as to the FAA, the Government's argument -- now pressed on behalf of the FHLBB -- that such acts should -- for that reason -- share in the protection afforded the public policy decisions underlying the program. "In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument • • • that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies."[17] *Id*. at 538.

The Court articulated a two-part test for determining the applicability of the discretionary function exception to such conduct. "[A] court must first consider whether the action is a matter of choice for the acting employee[;]" "conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536. Second, "assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id*. That determination requires an assessment as to whether the conduct is grounded in public policy. *Id*. Accordingly, the Court required the separate analysis of *each* alleged act of negligence. The Court then cited

[17] Expanding on this holding, the Court stated:

> That argument is rebutted first by the language of the exception, which protects 'discretionary' functions, rather than 'regulatory' functions. The significance of Congress' choice of language is supported by the legislative history. As this Court previously has indicated, the relevant legislative materials demonstrate that the exception was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are 'discretionary' in nature.

Berkovitz, 486 U.S. at 538-39.

its decision in *Indian Towing Co.*, 350 U.S. at 69, to illustrate this point. *Id.* at 538 n.3. That case involved an accident allegedly caused by the Coast Guard's negligent failure to maintain a lighthouse in working order. The Court held that, while the initial decision to build and maintain the lighthouse was a discretionary judgment, the failure to maintain the lighthouse did not involve a permissible exercise of policy judgment. *Indian Towing*, 350 U.S. at 69.

The Court in *Berkovitz* also expanded on the distinction drawn in *Indian Towing* between the making of a discretionary policy and its non-discretionary implementation. The Court noted that one possible claim raised in that case rested upon the allegation that government employees incorrectly determined that a vaccine satisfied applicable standards. The Court held that "the question of the applicability of the discretionary function exception requires a somewhat different analysis." "In that event, the question turns on whether the manner and method of determining compliance with the safety standards at issue *involves agency judgment of the kind protected by the discretionary function exception.*"[18] *Berkovitz*, 486 U.S. at 544-45 (emphasis added). The plaintiffs claimed that "the determination involves the application of objective scientific standards." *Id.* at 545. The Government claimed that "the determination incorporates considerable 'policy judgment.'" *Id.* The Court concluded that "the parties have framed the issue appropriately; application of the discretionary function exception • • • hinges on whether the agency officials making that determination permissibly exercise policy choice." *Id.*

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[18]The Government completely ignores this aspect of the court's holding in *Berkovitz*. *Brief* at 25.

B. The Individual Day-To-Day Management Decisions Challenged In Respondent's Amended Complaint Are Grounded In Business And Professional Expertise, Not Public Policy Judgment

Respondent unambiguously alleges that federal thrift officials negligently managed the actual day-to-day operations of IASA -- then financially sound -- and caused its collapse. The officials' extra-regulatory take-over of IASA -- largely prompted by problems those officials generated in causing the Investex merger -- occurred in two steps. First, in 1985, under threat of the net worth agreement, the officials secured Respondent's agreement permanently to relinquish his management role in IASA. Shortly thereafter, those officials -- using similar threats -- forced the resignation of IASA's directors and officers and replaced them with their own, hand-picked individuals, including a member of the board of the FHLB-Dallas and an employee of that same office. Second, the federal officials' involvement at IASA deepened until "the persons directing the management of IASA or actually managing the day-to-day operations of IASA were federal agents." *J.A.* at 6. For example, the officials negotiated the salary and employment conditions of the new directors and officers, mediated other salary disputes, selected financial and other consultants, decided whether to convert IASA from a state-to a federally-chartered thrift, determined whether and which IASA subsidiaries to place in bankruptcy, first prohibited and then authorized IASA to initiate certain litigation, and prevented state regulatory assistance to IASA. *Id.* at 15, para. 34. Moreover, the officials attended IASA board meetings, participating in and *directing* the board's decisions. *Id.* "[T]he agency actually substituted its decisions for those of the directors and officers of the association." *Id.* at 19, para. 55. In short, as the district court observed, "the Agencies went beyond their normal regulatory role by

participating and becoming the *de facto* decision-makers for the operations of IASA.'"[9] *J.A.* at 11, para. 23.

Using the two-step *Varig/Berkovitz* analysis, the court of appeals found that the federal regulators were free to choose from among alternatives in directing IASA's day-to-day operations and that these decisions did *not* rest upon public policy judgment. *Pet.App.* at 12a. The element of judgment involved in managing the day-to-day operations of a thrift is qualitatively different from the "public policy" judgment underlying the extra-regulatory take-over instituted here and that is necessary to exempt conduct from tort liability. Day-to-day thrift management requires many types of decisions, themselves drawing upon experience in a number of professional disciplines and knowledge of industry practices and standards. Many such decisions demand

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[9] In this Court, the Government disputes the substance of Respondent's allegations, contending that the thrift officials did not direct IASA's day-to-day management, but rather did nothing more than offer *advice*. The portions of Respondent's amended complaint quoted above unequivocally dispute that and allege that those officials "actually" manage[ed] the day-to-day operations of IASA." The Government also argues that the board of directors hand-picked by the thrift officials to replace IASA's own board were "managers of a private corporation following their selection [and] not subject to the 'direction' of federal regulators, only to their advice and recommendations." *Brief* at 38 n.25. Implicit in this argument is the pretense that the replacement board objectively weighed the officials' advice and independently decided upon a course of action. Respondent's allegations, of course, specifically dispute such a characterization. Moreover, the Government's argument ignores the plain fact -- acknowledged by both lower courts -- that thrift officials have considerable power over thrifts by virtue of, and through threats to exercise, their formal statutory authority. Indeed, the Government's present reluctance to concede the use made of its regulatory authority is in marked contrast to its pronouncement before *both* lower courts that "the discretion to regulate in this context is the discretion to do so thoroughly, even to the point of *controlling* and influencing the day-to-day operations of an association." *Reply To Respondent's Opp. To Mot. To Dis.*, at 5 n.6 (emphasis added.)

technical training in finance, capitalization, amortization, and property appraisals -- to name a few. Other decisions involve complicated projections and present value calculations. At times, a thrift officer must choose from among competing valuation methods in making a professional evaluation of a complex transaction. An officer must at other times gauge market trends and project interest rates and rates of return. Objective standards and prevailing industry practices aid in some decisions, while complicating others. "Thrift management judgment" is a blend of objective and subjective factors schooled by years of professional experience and developed technical expertise.

In short, the prudent management of a thrift requires business expertise and a combination of many technical skills, *not* governmental policy considerations. Similarly, the specific examples of individual management decisions alleged here are grounded in professional judgment. Decisions to manage an institution's assets, issue or call loans, raise or lower salaries, hire or dismiss consultants, and initiate litigation involve technical and business expertise and do not implicate the legislative quality of protected actions. Rather, these decisions call for the use of professional training to evaluate the most effective method for attaining results demanded in a specific situation.

The Court has consistently held that conduct grounded in this kind of technical and professional judgment falls outside the "terms and reason" of the discretionary function exception. In *Berkovitz*, the Court held that the "question turns upon the *method and manner*" in which a decision is made, and acknowledged that a "determination involv[ing] the application of objective scientific standards" for the release of vaccine falls outside the discretionary function exception. *Berkovitz*, 486 U.S. at 545. Similarly, the operation, inspection, and maintenance of a lighthouse rests upon technical and professional judgment, not the permissible exercise of public

policy judgment. *Indian Towing*, 350 U.S. at 62. The varied and complex judgments required to direct the flow, and ensure the safety, of air traffic also depend upon the exercise of professional and technical skills. *United States* v. *Union Trust Co.*, 350 U.S. 907 (1955) (summary affirmance).

The lower courts have also held that business and professional judgment are beyond the pale of the exception and restricted its application to public policy judgment. For example, "acts and omissions of [government] employees in performing • • • safety functions d[o] not involve policy judgments." *Camozzi* v. *Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 292 (9th Cir. 1989); *Seyler* v. *United States*, 832 F.2d 120, 123 (9th Cir. 1987) (failure to provide adequate road signs); *see also Prescott* v. *United States*, 724 F. Supp. 792, 798 (D.Nev. 1989) (decisions involving objective standards of care for protection of health and safety in nuclear weapons testing). The negligent exercise of engineering and navigational judgment is also actionable. *See, e.g., Kennewick Irrigation District* v. *U.S.*, 880 F.2d 1018, 1031 (9th Cir. 1989) (discretion of contracting officer to determine whether certain materials are "unsuitable" for canal construction purposes based "on *technical*, *scientific*, [and] *engineering* considerations") (emphasis added); *Drake Towing Co.* v. *Meisner Marine Construction Co.*, 765 F.2d 1060, 1065 (11th Cir. 1985) (placement of directional buoys); *Eklof Marine Corp.* v. *United States*, 762 F.2d 200, 205 (2d Cir. 1985) (same). Decisions guided by industry standards and practices similarly do not rest upon public policy judgment. *See, e.g., Arizona Maintenance Co.* v. *United States*, 864 F.2d 1497, 1504 (9th Cir. 1989) (choice of whether to test soil by drilling or blasting and choice of amount of dynamite to use). Maintenance decisions also fall outside the exception. *See, e.g., ARA Leisure Services* v. *United States*, 831 F.2d 193, 196 (9th Cir. 1987)

(maintenance of roadway). The conduct alleged here is analogous to that presented in these decisions.

In fact, lower courts addressing negligence in the thrift management context have found the discretionary function exception inapplicable. For example, in *In re Franklin National Bank Securities Litigation*, 445 F. Supp. 723, 733-34 (E.D.N.Y. 1978), the court held that if the FDIC "goes beyond [its] normal regulatory activities and substitutes its decisions for those of the officers and directors" of a bank, the FDIC may be liable for those decisions. Similarly, the Seventh Circuit in *Emch* v. *United States*, 630 F.2d 523, 528-29 (7th Cir. 1980), reached the same conclusions. *see also FDIC* v. *Carter*, 701 F. Supp. 730, 737 n.17 (D.Calif. 1987) (noting agreement with holding in *Franklin National Bank*). Further, the FDIC can be held liable as receiver for negligently failing to minimize the bank's damages by employing improper loan collection procedures. *FDIC* v. *Carter*, 701 F. Supp. at 738. Likewise, the FDIC's actions when disposing of the assets of a bank "are not grounded in social or economic policy." *Id.* at 736.

The Government does not -- nor can it -- seriously develop its argument that the actual day-to-day operations of a thrift embody public policy judgment. Instead, the Government contends that, because decisions about thrift operations involve economic *considerations*, they "are clear examples of precisely the type of 'economic' judgments that the discretionary function exception protects." *Brief* at 39 and 41 ("cost considerations can amount to the sort of 'discretion' protected by the discretionary function exception"). This argument conflates the concept of economic "policy" in the sense of applying acquired knowledge and experience to the problems facing a specific *private* thrift on a day-to-day basis with that of *public* economic policy, *i.e.*, the balancing of feasiblity, costs, safety, and other factors in attaining the goals of a regulatory program. Congress reserved, and the Court has predicated application of,

the discretionary function exception upon the latter concept.[20] *Berkovitz*, 486 U.S. at 537 (exception limited to "public policy" considerations).

None of the cases relied upon by the Government supports the broad proposition necessary to its argument. For example, the Government cites *Pennbank* v. *United States*, 779 F.2d 175 (3d Cir. 1985), for the proposition that the denial of a loan is a discretionary function. In that case, however, a federal district court had enjoined further operation of the facility for which the loan was intended because of its continuing violation

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[20] The Government cites *Kennewick Irrig. Dist.* v. *United States*, 880 F.2d 1018, 1031 (9th Cir. 1989), for the proposition that the "commercial activity" of designing irrigation canals for a project falls within the discretionary function exception "principally because of the need for government decision makers to weigh the 'vital item of cost' in determining the appropriate design." *Brief* at 40. The Government does not report the court's other holding that, irrespective of the cost considerations involved, decisions critical to the construction of that same canal did not involve policy judgment and fell outside the exception. *Id.* at 1030, 32. The court reasoned that such decisions -- as do those at issue here -- rest upon professional and technical expertise. Moreover, the court decidely rejected the argument -- pressed by the Government -- that cost considerations are determinative of the nature of conduct for purposes of the exception, noting that if it were so virtually all agency actions would be protected. *Id.* at 1031.

The Government's reliance on the Court's decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988) for the importance of cost considerations to the applicability of the exception fares no better. The Court specifically noted that the military procurement decision in question involved "not merely engineering analysis," but balancing social considerations such as "greater safety" versus "greater combat effectiveness."

Further, the Government cites *U.S. Gold & Silver Investments, Inc.* v. *Director, U.S. Mint*, 656 F. Supp. 380 (D.Ore. 1987) for the proposition that trademark decisions are discretionary functions, but fails to note that the decision had been vacated on appeal. *U.S. Gold & Silver Investments, Inc.* v. *United States*, 885 F.2d 621, 622 (9th Cir. 1989) (vacating discretionary function exception holding on ground that FTCA does not incorporate claims for violation of Lanham Act).

of *federal environmental laws*. Further, another federal statute, 7 U.S.C. 1926(a)(10), "precluded the FmHA [*i.e.*, the agency involved] from spending money on projects which pollute the environment." *Id.* at 177 n.1. As a result, the agency's decision did not involve the exercise of discretion at all. Similarly, the plaintiff in *Williamson* v. *U.S. Dep't of Agriculture*, 815 F.2d 368 (5th Cir. 1987) was *ineligible* under the agency's objective requirements for the loan in question. The denial of the loan application, therefore, fell within the holding of *Dalehite* that conduct in conformance with agency specifications is protected. Moreover, both cases address an agency's allocation of its own funds (in accord with policies adopted by the agency), not with an agency's allocation of the funds of an entity it purports to regulate.

Moreover, even an agency's decision to allocate its own funds -- as opposed to directing the allocation of funds belonging to a private company it is ostensibly regulating -- is not *ipso facto* protected under the exception.[21] "Indeed, virtually all government actions affect costs since action itself requires resources." *Kennewick*, 880 F.2d at 1031. Accepting the Government's argument would, then, make the existence of an element of choice in agency conduct both a necessary and dispositive condition to the application of the discretionary function exception and would eviscerate the FTCA's waiver of immunity.

Apparently recognizing the insubstantiality of its factual argument, the Government alternatively argues that each individual management decision was taken in extension of the thrift officials' extra-regulatory takeover of IASA and shares in the protection afforded a decision

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[21] *See, e.g., ARA Leisure*, 831 F.2d at 195 (fact that decision-maker required to work within a budget does not make decisions regarding maintenance of park roads discretionary function); *see also Kennewick Irrigation District*, 880 F.2d at 1024 (economic *considerations* not necessarily equivalent to economic *policy*).

to have pursued formal statutory procedures instead.[22] In particular, the Government asserts:

> FHLBB's decisions to offer advice to IASA, rather than resort immediately to sterner regulatory measures, *were simply an aspect of* its highly discretionary policy-oriented judgment about 'whether and how to intervene' in that institution's affairs. Accordingly, any advice and guidance FHLBB offered to IASA must be recognized as integral to its broader regulatory activities.

Brief at 43 (citations omitted) (emphasis added.) Similarly, the Government contends that,

> because all these actions [*i.e.*, the alleged individual management decisions concerning IASA's day-to-day operations,] were taken *in lieu of pursuing more formal regulatory actions*, including receivership, federal regulators also had to consider at every juncture whether the particular

[22] The court of appeals properly rejected the Government's attempt indiscriminately to sweep any decision made in extension of a discretionary act within the exception without first determining whether that decision rested upon public policy judgment. Quoting from its decision in *Collins* v. *United States*, 783 F.2d 1225, 1233-34 (5th Cir. 1986) (Brown, concurring), the court observed:

> Every act of a rational being involves some choices -- speed up or slow down, turn right or left, put helm port or starboard, go full astern or full ahead, tighten brakes or replace them, glide in or circle, use general anesthetic or local, use a human heart or a JARVIK 7. It is plain that the discretionary function exception of [sec] 2680(a) must be applied with restraint if the Tort Claims Act is to achieve the dual purpose which motivated its enactment.

Pet. at 12a.

> actions they recommend were likely to produce beneficial results justifying the agency's continued forbearance from formal proceedings.

Id. at 44. In essence, then, the Government contends that each individual day-to-day management decision actually consisted of two components: (1) a re-affirmation of the earlier decision in favor of an extra-regulatory take-over in lieu of, for example, a conservatorship; and (2) the management decision itself. Because of the purportedly protected nature of the former element,[23] and despite the unprotected nature of the latter, each individual management decision should receive protection under the discretionary function exception.

The Government's contrived analysis flatly contradicts the Court's clear pronouncement that an act does not warrant protection under the discretionary function exception merely by virtue of the fact that it was taken in implementation of a protected policy decision. *Dalehite*, *Varig*, and *Berkovitz* presented challenges to conduct taken in extension of a protected policy decision. In each case, the Court examined the nature of the individual act *before* determining whether the act fell within the exception. In *Dalehite*, the Court held that policy directives dictated the challenged conduct, thereby making the plaintiffs' claim a direct challenge to the policy judgment underlying the program itself. The Court noted, however, that, if the claim rested upon individual acts of negligence (not to policy judgments), dismissal would have been inappropriate. The Court in

[23] Again, as explained earlier, owing to IASA's financial condition, thrift officials did not have the option of placing IASA into conservatorship or receivership. Indeed, the officials' very decision to assume control of IASA's day-to-day operations placed their conduct beyond the pale of federal regulatory policy. Once more, therefore, the Government's argument proceeds from an invalid premise.

Varig also concluded that the plaintiffs' claims challenged program policy, not individual acts of negligence.

In *Berkovitz*, the Court held that certain acts, admittedly taken in extension of a protected decision, fell outside the exception. The Court rested that holding upon a determination that, despite being an aspect of a protected decision, the challenged acts did not involve public policy judgment. The Court illustrated the point further with a citation to *Indian Towing*, observing that, while the decision to build and operate a lighthouse warranted protection, the actual operation of it -- not involving the permissible exercise of policy discretion -- did not. *Berkovitz*, 486 U.S. at 538 n.3. Lower courts have similarly determined that non-policy based acts fall outside the exception even if integral to a protected policy decision. *See, e.g., Kennewick*, 880 F.2d at 1030-32. Applying the artificial parsing of agency decision-making urged by the Government here would, as a matter of logic, require a different result in each of these cases. For example, under the Government's mechanical test the decisions resulting in the failure of the lighthouse in *Indian Towing* were as much an "aspect" of the initial decision to build and operate the lighthouse as were the individual management decisions here an aspect of the initial decision to institute an extra-regulatory take-over.

C. Dismissing Respondent's Amended Complaint Would Extend The Discretionary Function Exception Beyond The Limited Role Contemplated By Congress And Afford Thrift Officials Absolute Immunity

Reduced to its operative premise, the Government's argument asks the Court to adopt the precise axiomatic approach taken by the district court, *i.e.*, that any act -- *regardless* of whether it rests upon public policy -- taken in extension of protected act necessarily shares in

that protection. Conspicuously absent from the Government's argument is the articulation of any standard defining what conduct of thrift regulators would ever be actionable under the FTCA. Indeed, to dismiss the remaining Count of Respondent's amended complaint the Court must hold that, *as a matter of law*, no degree of involvement by individual federal officials in the actual running of an otherwise financially-sound institution can give rise to an actionable claim. The effect of such a mechanical test would be to cast indiscriminately any and all actions of the thrift officials within the pale of the discretionary function exception if such actions arguably occurred in a chain of events initiated by an action itself properly within the exception. The universe of possible regulatory activities would thereby become a *subset* of discretionary activities within the exception.[24]

The Government's claim of entitlement to absolute immunity for thrift regulators squarely contradicts the

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[24] The Government does not directly address the obvious consequence of its position. Rather, noting that the Court in *Berkovitz* rejected absolute immunity for regulatory agencies, the Government in a footnote tersely contends: "We do not make any such argument in this case." *Brief* at 25 n.15. Yet, in the lower court here, the Government was far from shy in identifying the breadth of immunity it sought:

> There simply is no such thing in the thrift regulatory context as a decision to regulate on the one hand and a decision to take over the management of a thrift on the other. Rather, there is a continuing series of discretionary decisions many of which profoundly affect the management and direction of the institution. * * * *In this area of regulation, the mandate to regulate is equal to the power to control and influence the affairs of the association regulated* * * *.

Pet. for Rehearing at 29 (emphasis added). Elsewhere the Government stated: "The discretion to regulate in this context is the discretion to do so thoroughly, *even to the point of controlling and influencing the day-to-day operation of an association*." *Id.* at 36 n.24 (emphasis added).

terms of the discretionary function exception, its legislative history and that of the FTCA, and the Court's steadfast refusal, by judicial decision, to legislate another categorical exception to the Act. Congress was deliberately parsimonious in granting categorical exemptions to the FTCA; *no* regulatory agency received such favored status. In fact, Congress rejected such an exemption for the Securities and Exchange Commission and the Federal Trade Commission. The Court has before been called upon to deny the Government's efforts to obtain a judicial amendment to the FTCA and has firmly concluded: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier*, 352 U.S. at 320. Accordingly, and in recognition of the limited nature of the exception, the Court has consistently restricted its application to the permissible exercise of "public policy" judgment. *See, e.g., Berkovitz*, 486 U.S. at 537. The Court in *Berkovitz* rejected the very argument the Government presses here. *Id.* at 538.

The Government and the parties *amici* raise the specter that the court of appeals' decision will "hobble" federal efforts to address problems in the thrift industry. The wide-ranging latitude guaranteed thrift regulators by that decision dispels any such concerns. The court dismissed over two-thirds of Respondent's allegations as within the exception and has clearly protected any arguable discretionary functions involved. For example, the Government will never have to answer for the folly of merging the then sound IASA with Investex, a much larger thrift facing financial ruin.[25] Further, granting

[25] The inaccurate characterization of the "regulatory context" resulting from the Government's selective use of extra-record materials, including the Independent Counsel Report (*Harwell Report*), becomes especially clear when considering the Investex

(continued...)

thrift officials such immunity elevates them to a status more protected than that of other agencies and other branches of the Government and affords them greater protection in the exercise of their informal powers than they would have if they formally exercised their statutory authority.[26] *See FDIC* v. *Hartford Insurance Co.*, 692 F.

[25] (...continued)
merger. The Government fails to mention that "IASA • • • was considered to be a sound institution" before the merger and that "[Respondent] was not accurately informed of the intentions of the regulators at that time." *Harwell Report* at 78, 153. That is, the counsel concluded that "the prime motivation for the FHLBB in approving the transaction" was to enable "the FSLIC to avoid an immediate $40-50 million loss it would have suffered as a result of the Investex failure." *Id.* Indeed, the FHLBB staff "initially joked about the transaction," but when "informed • • • that it would potentially prevent the FSLIC fund from suffering a $40-50 million loss, the tone changed." *Id.* at 75. Moreover, "the combined effect of the neutralization agreement and the approval of the Investex • • • transaction[] was that IASA had four times as much money as it previously had to invest, while at the same time the one person who might have been able to wisely invest these funds [viz., Respondent] was removed. For these reasons, it is the opinion of Independent Counsel that at least in hindsight the neutralization agreement was not consistent with good judgment. While it was apparently entered into by the FSLIC because of the desire to save the FSLIC fund from the Investex losses [viz., "$40-50 million"], it may well be that the neutralization agreement and the events that followed [viz., the thrift officials' day-to-day management of IASA] will have exactly the opposite effect, and will cost the FSLIC far more than the losses it would have experienced solely due to the insolvency of Investex." *Harwell Report* at 78-79, 153. Therefore, although federal thrift policy required officials to prevent "potential harm to the institution," *Res. No. 82-381* at 2; it is clear that the sole purpose for the Investex merger -- as viewed by those officials bound by that Resolution -- was to save losses to the FSLIC trust fund even at an (acknowledged) "significant risk" to IASA.

[26] Granting such immunity is especially troublesome here where the officials' conduct in controlling IASA's actual day-to-day operations constituted the type of intervention that would be

(continued...)

Supp. 866 (N.D.Ill. 1988), *vacated on other grounds*, 877 F.2d 590 (7th Cir. 1989). As a result, granting absolute immunity to thrift regulators at this critical juncture would remove any incentive they might have sensibly and prudently to operate an association.

Both the Government and the parties *amici* contend that immense damage awards against the Government will arise out of the court of appeals' decision. No basis exists for such concerns. The factual circumstances surrounding Respondent's remaining claim are unique. The Government cites but one case to support its contention that the court of appeals "has opened the door to disgruntled creditors to bring suit against the United States." *Pet. Brief* at 46, n.32. The Government does not inform the Court, however, that this case is just another claim pending from the extra-regulatory take-over of *IASA*; the identical thrift and conduct at issue here. Further, although nearly a year has passed since the court's decision, Respondent could find no reported decision involving facts at all similar to those presented here or even a reference to the decision in support of an order denying a motion to dismiss under the discretionary function exception. Indeed, following the

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[26] (...continued)
warranted only if IASA were financially imperiled -- which it was not -- and which, under agency policy directives, should have been accomplished through formal means, such as a conservatorship, that brought with it certain protections for Respondent and IASA's other shareholders. *See Res. No. 82-321* at 1-2. Again, the unprecedented nature of the conduct alleged here stems directly from the fact that the officials employed procedures not contemplated by the very policy the Government cites in support of that conduct. In addition, even such formal procedures would not give the FHLBB the day-to-day control exercised here. *See* notes 13 & 18, *supra*.

passage of FIRREA, many of the actions alleged here *cannot* occur again.[27]

In enacting the FTCA, Congress was well aware that permitting suits against the Government based on the negligent acts of federal officials could impose "a heavy burden * * * on the public treasury." *Rayonier*, 352 U.S. at 319. "But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act." *Id.* at 319-20. Further, "Congress was aware

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[27] The Government asserts that the newly enacted "FIRREA" "place[s] the present controversy in context" and supports its assertion that the conduct of regulators in the instant case was justified. *Brief* at 4-5. To the contrary, the new legislation responds in large part to the need Congress preceived for stronger direction and greater accountability on the part of thrift regulators. In particular, Congress specifically recognized that "many of the problems facing the FSLIC and the thrift industry stem from the concentration of responsibility and authority within the FHLBB and the potential for conflicts of interest which may arise because of close ties between the Bank Board and the thrift industry." *Report 101-54 of the House Committee on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. ("*Report*") at 310. In listing the regional concentration of failed thrifts, Congress observed the highest concentration in the region under the FHLB-Dallas' control. *Report*, at 304.

Congress also expressed dissatisfaction with one regulatory practice exemplified in this case -- *i.e.*, the appointment of former FHLBB officials to the replace a thrift's officers and directors -- and stated "[t]he [current] system is rife with real and potential conflicts of interest which *compromise the integrity of the regulatory*, insurance and credit *functions* of the Federal Home Loan Bank System. This provision seeks to assure a more rational, reasonable and responsive system." Indeed, Congress specifically stated that "[t]he Committee believes that a clear separation of the credit and supervisory functions -- with clear accountability -- is better public policy." *Report*, at 453

Finally, FIRREA -- contrary to the Government's suggestion that it affords as much, if not more, latitude for thrift regulators to employ the 'informal' procedures at issue here -- reduces the arsenal of methods these regulators may use. For example, Section 902 prohibits a "temporary" cease-and-desist order of an indefinite term. Arguably, then, the "Neutralization Agreement" used here would no longer be permitted.

that when losses * * * are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government," "[b]ut when the entire burden falls on the injured party it may leave him destitute or grieviously harmed." *Id.* at 320.

D. The Court Could Alternatively Remand This Case For A Determination Whether Respondent's Remaining Claim Is Cognizable Under The FTCA

The FTCA permits suit only "where the United States, if a private person, would be liable *to the claimant* in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b) (emphasis added). Following a lengthy examination of Texas law, the court of appeals disposed of Respondent's claim of $75 million for the dimunition in the value of his IASA shares on the ground that "Texas law does not permit [Respondent] an individual cause of action." *Pet. Ap.* at 19a. The court then held that it did "not have sufficient information in the record to allow [it] to pass on whether [Respondent] has a ["personal"] cause of action" for his $25 million claim based on the net worth agreement. *Id.* Noting that "it may depend on whether there was an express or implied promise as part of the guarantee that the federal officials would not negligently cause the deterioration of the corporation," the court remanded that claim to the district court "to determine whether a valid claim is presented." *Id.* at 19a-20a.

The complex and important issue whether the discretionary function exception encompasses the negligent day-to-day management by federal thrift officials of Respondent's thrift depends, therefore, entirely upon an equally difficult issue of state law. If the district court were to find that Respondent does not have a "personal cause of action" on his remaining claim, the court of appeals' discussion of the exception will become *dicta*.

In the court below, the Government conceded the interlocutory nature of the court of appeal's discussion of the discretionary function exception, arguing in its Petition for Rehearing that the "part of the opinion which construes the FTCA's discretionary function exception should be deleted because it is *dicta* only." *Pet. for Rehearing* at 14. The Government's brief does not deny the position taken below; nor has the Government addressed the issue here.

The same can be true of a decision rendered by this Court. The discretionary function exception issue will not be squarely presented until the lower courts resolve the outstanding state law question of whether Respondent has a "valid claim." In effect, the Government's brief seeks a potentially advisory opinion from the Court. As it is the Court's practice both to defer to lower court interpretations of state law and to abstain from deciding complex federal issues dependent upon a particular construction of state law (not yet decided), the Court should affirm the court of appeals' decision remanding this case for further proceedings. Although the Government in its brief before the Court leaves this issue -- squarely raised by Respondent's opposition to the Government's petition for *certiorari* -- entirely unaddressed, the Government and both lower courts often characterize this state law issue as one of "standing." As discussed above, the issue is more accurately understood as that of whether Respondent has a cause of action that the FTCA can incorporate. Whether cast as a standing issue or a substantive law issue, the framework of the FTCA makes it a threshold issue. Disposition of the threshold issue -- perhaps obviating the need to address the far more consequential federal immunity issue -- is even more desirable in circumstances such as these where the

immunity issue is inextricably bound to the merits of Respondent's substantive allegations.[28]

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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September 28, 1990

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[28] The Government's brief exemplies the problems created by addressing the immunity issue before a final determination is reached as to whether the FTCA even applies. The Government cites *U.S. Gold & Silver Investments*, 656 F. Supp. at 382, 83, for the broad proposition that the discretionary function exception precludes a FTCA challenge to trademark decisions. *Brief* at 40. The Government failed to note, however, that the Ninth Circuit *vacated* that holding on the very ground that could render the court's decision here advisory -- *viz.*, the claim asserted was not cognizable under the FTCA in the first place. *U.S. Gold & Silver Investments*, 885 F.2d at 621.

APPENDIX

A. STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), provides in relevant part:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Section 2680 provides in its entirety:

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of any act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, Sec. 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

B. BANK BOARD RESOLUTION

FEDERAL HOME LOAN BANK BOARD

Resolution No. 82-381

Dated: May 26, 1982

WHEREAS, the Federal Home Loan Bank Board has considered the recommendation of the Office of Examinations and Supervision and the Office of General Counsel to adopt a formal statement of policy regarding the Bank Board's use of supervisory actions, and

WHEREAS, the adoption of such statement of policy also will implement a recommendation of the General Accounting Office for the strengthening of the Bank Board's formal supervisory process,

IT IS RESOLVED that the following statement of policy is hereby approved and adopted:

FEDERAL HOME LOAN BANK BOARD STATEMENT OF POLICY REGARDING SUPERVISORY ACTIONS

In carrying out its supervisory responsibilities with respect to thrift institutions insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"), their holding companies, service corporations, and affiliated officers and directors, it is the policy of the Federal Home Loan Bank Board that violations of law or regulation, and unsafe or unsound practices will not be tolerated and will result in the initiation of strong supervisory and/or enforcement action by the Board. It

is the Bank Board's goal to minimize, and where possible, to prevent losses occasioned by violations or unsafe and unsound practices by taking prompt and effective supervisory action. Supervisory agents and examiners should promptly identify and take action to prevent the continuation of violations or practices that may result in financial harm to the institution, its customers, or the FSLIC before such harm actually has resulted.

The Board recognizes that supervisory actions must be tailored to each case, and that such actions will vary according to the severity of the violation of law or regulation or the unsafe or unsound practice, as well as to the responsiveness and willingness of the association to take corrective action. The following guidance should be considered for all supervisory actions.

In each case, based upon an assessment of management's willingness to take appropriate corrective action and the potential harm to the institution if corrective action is not effected, the staff must weigh the appropriateness of available supervisory actions. If the potential harm is slight and there is a substantial probability that management will correct the situation, informal supervisory guidance and oversight is appropriate. If some potential harm to the institution or its customers is likely, a supervisory agreement should be promptly negotiated and implemented. If substantial financial harm may occur to the institution, its customers, or the FSLIC and there is substantial doubt that corrections will be made promptly, a cease-and-desist order should be sought immediately through the Office of General Counsel.

In those instances where substantial harm to the association, its customers, or the FSLIC is not likely, but there are continuing violations of law or regulations or

of unsafe or unsound practices, and informal supervisory actions, including the implementation of supervisory agreements, have not resulted in prompt satisfactory corrective action, or in those instances where there aresubsequent or repeated violations after informal supervisory actions have been taken, cease-and-desist actions should be pursued through the Office of General Counsel.

To expedite the implementation of appropriate cease-and-desist actions, the Bank Board, on February 18, 1982 (Resolution No. 82-99), delegated to the staff the authority to negotiate consent cease-and-desist orders, subject to final Bank Board approval.

By the Federal Home Loan Bank Board

/s/

J.J. Finn
Secretary

(10)

No. 89-1793

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1990

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UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As reflected in our opening brief, this case presents two issues for the Court's decision. The first is whether the court of appeals erred in articulating and applying a mechanical test for determining the scope of the discretionary function exception—a test that turns on whether those actions can be characterized as "operational" in nature. As we have shown, the court of appeals' application of such an erroneous test requires, at a minimum, that its judgment be reversed so that a proper test can be applied—one that focuses on whether the conduct in question involved the exercise of policy judgment. See U.S. Br. 18-35.

The second issue presented—the evaluation of the particular actions at issue under a proper test—could be left

to further proceedings on remand. But we have shown that the present record permits this Court to address that issue now, and to uphold the district court's conclusion that the challenged actions fall within the discretionary function exception. U.S. Br. 36-47.

In his brief to this Court, respondent blurs the distinction between these two issues and focuses almost entirely on the second. Indeed, respondent eschews any real defense of the court of appeals' rationale, instead attempting to reformulate that court's reasoning and suggesting his own mechanical tests. These tests are ultimately no more appropriate than the one articulated by the court below, for they, too, represent efforts to short-circuit the required analysis of the nature of the discretion exercised in particular contexts.

Nor does respondent succeed in his attempts to refute the discretionary nature of the specific regulatory actions on which his claim is based. Notwithstanding respondent's rhetoric about the supposedly egregious errors committed by federal regulators, he fails to undermine the district court's determination that the challenged actions were policy-based, discretionary decisions by federal regulators—actions that fall within the discretionary function exception "whether or not the discretion involved [is] abused." 28 U.S.C. 2680(a).[1]

A. 1. Perhaps the most serious flaw in the court of appeals' ruling is its reliance—in determining that certain activities of federal thrift regulators fall outside the discretionary function exception—on the supposedly

[1] Respondent also makes the essentially frivolous argument that the discretionary function issue is "not * * * squarely presented" and that any ruling on this point by this Court will be an "advisory opinion." Resp. Br. 47. On the contrary, the discretionary function issue is squarely presented by virtue of the positions taken by the parties below and the ruling of the court of appeals. As noted in our reply brief at the petition stage, a ruling on that issue by this Court will have very real, nonadvisory consequences: if the Court agrees with our position, the case is at an end; if the Court adopts respondent's arguments, the litigation must continue.

"operational" nature of those activities. The centrality of this mechanical test in the court of appeals' analysis is plain on the face of that court's opinion. The court expressly stated that the distinction between discretionary policy decisions and "operational actions"—a distinction purportedly derived from this Court's opinion in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955)—"still retains its force today and is dispositive of this case." Pet. App. 7a. Applying what it called "the *Indian Towing* test," the court of appeals dealt with the specific regulatory actions at issue in the most conclusory manner, stating simply that federal regulators "lost the protection of § 2680(a)" when they purportedly "assume[d] operational control" by advising IASA's officers and directors about specific issues regarding the institution's management. *Id.* at 13a, 14a.

Respondent makes at most a half-hearted effort to defend the court of appeals' approach, contending that a focus on the "operational" nature of government activities is inappropriate "only if it reflects that the court's analysis turned solely upon the *level* in the employment hierarchy occupied by the actor involved." Resp. Br. 12 n.6. Respondent then argues that there can be no such problem in the present case, because all of the conduct at issue (the conduct held within and beyond the exception) was carried out at the same level. *Ibid.* This simplistic reasoning ignores the fact that improper emphasis on the level at which an action is taken is only one of the errors inherent in the court of appeals' "operational" test. See U.S. Br. 32. The more basic flaw in that test (or any other equally mechanical test) is that it pretermits the required analysis—*i.e.*, a determination whether an action, in context, entailed discretionary decision-making grounded in considerations of "social, economic, and political policy." *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 814 (1984).

Tacitly acknowledging this essential point, respondent attempts to recharacterize the court of appeals' reliance

on the supposed "operational" nature of the actions at issue here as mere "shorthand" for the requisite analysis of the challenged conduct. Resp. Br. 12 n.6. But respondent can point to nothing in the court of appeals' decision to support this notion. Consider, for example, respondent's allegation that federal officials "urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered savings and loan," Amended Compl. para. 34.b, J.A. 14—one of the allegations that the court of appeals held was outside the discretionary function exception, Pet. App. 14a. If the court of appeals had actually applied the test articulated in *Varig Airlines*, that court would have confronted the question whether the discretion exercised in taking such an action was grounded in public policy concerns.[2] Yet the court of appeals' opinion is devoid of any such analysis; the court merely branded this and other actions as "operational" and considered the matter closed. *Ibid.*

2. The equally mechanical alternatives proposed by respondent are no more faithful to the text and policies of the FTCA than the "operational" test endorsed by the Fifth Circuit. For example, respondent repeatedly argues that the discretionary function exception does not encompass "individual acts of negligence." Resp. Br. 23, 25, 28, 39-40. That limitation, however, finds no support in the text of the FTCA. Moreover, respondent has lifted that phrase out of context from the preliminary factual

[2] The answer to such an inquiry, in our view, is obvious. If a federal official advises (or even pressures) a regulated institution to alter its status in such a way as to take it out of the jurisdiction of state regulators and make it subject to more extensive federal regulation, such an action is necessarily based on that official's discretionary judgment about the application of regulatory policies. Whether such advice is ultimately right or wrong—"whether or not [the official's] discretion involved be abused," 28 U.S.C. 2680(a)—taking such action is inherently within the scope of the sort of public policy matters Congress has shielded from " 'second-guessing' * * * through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814.

discussion in *Dalehite* v. *United States*, 346 U.S. 15 (1953). As used by respondent, the phrase is virtually meaningless, and in no way reflects any principle endorsed by this Court in that case. Although *Dalehite* made a passing reference to the absence of allegations of "individual acts" of negligence, *id.* at 23, nowhere did the Court suggest that this phrase should be used to determine how particular challenged actions should be treated. On the contrary, the Court's analysis in *Dalehite* emphasized the breadth of governmental decisions to which the discretionary function exception applies, extending both to very specific decisions about a manufacturing process and to actions regarding the supervision of the loading of ships. See *id.* at 38-43; U.S. Br. 22-23.

Respondent attempts to find support for its "individual acts of negligence" approach in this Court's opinion in *Varig Airlines*, Resp. Br. 28, 39-40, but that attempt is similarly wide of the mark. In *Varig Airlines*, the Court made it clear that individual negligent actions *can* fall within the exception if they entail the requisite exercise of policy discretion. *Varig Airlines* applied the discretionary function exception not only to a broad agency decision to institute a "spot-check" inspection program, but also to specific allegations of negligence in failing to check certain specific items in the course of certifying a particular aircraft. 467 U.S. at 820.[3] This holding squarely refutes any notion that application of the discretionary function exception can or should turn on such an artificial criterion as whether the challenged conduct involved only an "individual act of negligence." The key inquiry is whether

[3] Respondent attempts to trivialize this pivotal ruling in *Varig Airlines* by suggesting that the Court would have reached an opposite result if the alleged specific acts of negligence had involved negligence in an "actual inspection" rather than failure to inspect. Resp. Br. 28 & n.16. This Court never suggested such an artificial distinction between misfeasance and nonfeasance, and the entire logic of the Court's analysis refutes respondent's position that acts of alleged misfeasance necessarily fall outside the scope of the exception.

the action in question—regardless of whether it is a broad decision made by a Cabinet-level officer at the planning stage, or a "specific act" of alleged negligence by a subordinate—was itself one calling for the exercise of policy judgment.

In attempting to apply his "specific act of negligence" test, respondent not only fails to shed any light on the question at hand, but also misstates our position. See Resp. Br. 39-40. Contrary to respondent's contentions, we have never argued that *any* action falls within the discretionary function exception "merely by virtue of the fact that it was taken in implementation of a protected policy decision." *Id.* at 39. If that were our position, we would have omitted the second part of the argument in our opening brief (at 36-47), because all of the actions at issue here were plainly "in implementation of" policy decisions regarding thrift regulation. The position we have taken in this case—consistent with this Court's discretionary function rulings—is simply that each challenged action must be evaluated to determine whether it entailed the exercise of policy judgment.

3. Respondent's other mechanical test is his claim that discretionary decisions by federal officials involving "professional and technical judgment" are necessarily beyond the scope of the exception. Resp. Br. 21-22, 33-34, 36. Such a sweeping rule, however, would exclude from the exception a vast array of unquestionably policy-oriented decisions, and therefore would vitiate important policies served by the exception itself. Indeed, it is likely that most significant governmental decisions are made by employees who, by virtue of the training necessary to their jobs, can be said to exercise professional or technical judgment.

Respondent's theory also cannot be reconciled with *Dalehite* and *Varig Airlines*. *Dalehite*, for example, held that highly technical decisions regarding the fertilizer manufacturing process—*e.g.*, the determination of the temperature at which the fertilizer would be packed and the type

of coating that would be used—fell within the exception since they were intertwined with policy decisions affecting the feasibility of the program. See 346 U.S. at 40-41. In *Varig Airlines*, the decisions of individual aircraft inspectors as to the appropriate scrutiny of particular aircraft elements necessarily involved the application of the same sort of professional and technical expertise as that exercised by the designers and manufacturers of the aircraft. This Court recognized that the decisions made by the persons applying those skills "fall squarely within the discretionary function exception," 467 U.S. at 820, because they occurred in the context of a regulatory program that called upon the inspectors to exercise discretion related to the underlying regulatory policies. Other discretionary function exception cases have similarly found policy discretion in such professionally or technically oriented matters as the design of a canal [4] or the design and maintenance of a missile control room.[5]

As we have shown, the context in which an activity is carried out can imbue an action with a strong public policy orientation, even if that action superficially resembles activities conducted by ordinary businesses. For example, although the evaluation of a loan applicant is an everyday commercial decision for financial institutions, the analogous decision by a federal lending agency normally entails discretion related to the policies of the federal loan program, and thus falls within the discretionary function exception. See *Williamson* v. *United States Dep't of Agriculture*, 815 F.2d 368, 374-376 (5th Cir. 1987).[6]

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[4] *Kennewick Irrigation Dist.* v. *United States*, 880 F.2d 1018, 1027-1028 (9th Cir. 1989).

[5] *Ayer* v. *United States*, 902 F.2d 1038 (1st Cir. 1990).

[6] Respondent errs in characterizing our position as arguing that *any* decision involving economic or cost considerations necessarily falls within the discretionary function exception. See Resp. Br. 23 n.12, 25 n.14.

And even the most obvious types of protected discretionary decisions made by federal banking regulators—such as a decision that a particular institution is insolvent, and hence subject to receivership or similar regulatory measures [7]—necessarily involve the same sort of "professional" and "technical" judgments that respondent emphasizes in this case.

Relying on a passage from *Berkovitz* v. *United States*, 486 U.S. 531, 544-545 (1988), respondent implies that decisions turning solely on "objective scientific standards" necessarily fall outside the scope of the discretionary function exception. Resp. Br. 30. A full reading of the passage in *Berkovitz* reveals, however, that such "objective" standards take an action outside the discretionary function exception only if they control the decision in question, to the exclusion of the exercise of policy judgment. With respect to the matter at issue there, this Court remanded for further proceedings, to determine whether federal officials "permissibly exercise policy choice" in making that particular type of decision. 486 U.S. at 545. Thus, this passage simply reinforces the established principle that the application of the discretionary function exception cannot turn on such mechanical tests as whether the action is "operational," involves only a "single act of negligence," or entails the exercise of "professional" judgment; it must instead turn on a careful evaluation of whether the particular type of action at issue, in the context in which it is taken, involves the exercise of policy judgment.

B. Even as catalogued by respondent, Resp. Br. 31, the actions challenged here were highly discretionary matters in which federal thrift regulators necessarily exercised a high degree of judgment. Federal officials are alleged to have influenced the choice of managers, directors, and consultants for IASA, as well as other important decisions

[7] *Golden Pacific Bancorp.* v. *Clarke*, 837 F.2d 509 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988); see also U.S. Br. 41 n.29 (collecting cases).

regarding conversion to federally chartered status, the placement of subsidiary corporations into bankruptcy, and the institution of litigation. As an initial matter, there can be no question that such activities involve delicate, discretionary choices that bear little resemblance to the nondiscretionary activities at issue in many of the cases on which respondent relies—activities such as maintenance of a lighthouse in working order,[8] deciding whether to provide road warning signs,[9] or the placement of directional buoys.[10] See Resp. Br. 34. The only question, then, is whether the discretionary decisions involved here called for the use of *policy* judgment by the federal thrift regulators. When the challenged activities are viewed in their regulatory context, it is apparent that they were indeed imbued with precisely the sort of policy discretion that Congress intended to shield when it enacted the discretionary function exception.

1. In his brief to this Court, as throughout this litigation, respondent strives to ignore the context in which the challenged regulatory actions took place. From respondent's rhetoric, one might suppose that the "interference" in IASA's affairs that took place was simply the result of aberrant actions of persons who happened to be employed by federal agencies. The record belies that view. As shown in our opening brief, the context in which the challenged actions occurred included, at a minimum, regulatory concerns about respondent's fitness and IASA's soundness. U.S. Br. 8-9, 39 n.26. Whether those concerns were well-founded—and whether the subsequent regulatory actions were proper—are not at issue here, for the discretionary function exception applies "whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

[8] See *Indian Towing Co.* v. *United States*, *supra*.

[9] See *Seyler* v. *United States*, 832 F.2d 120 (9th Cir. 1987).

[10] See *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985).

Respondent would have this Court ignore entirely the background in which the challenged actions took place simply because that background cannot be ascertained within the four corners of his complaint. Contrary to respondent's supposition, the basic background information the United States introduced in the district court was a proper part of its presentation in support of a motion to dismiss for lack of subject matter jurisdiction. See U.S. Br. 6 n.6; *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947). And contrary to respondent's present argument, the basic background facts on which we rely are *not* in conflict with anything in his complaint and have not been disputed. For example, in characterizing our brief as "contend-[ing]" that IASA was in fact already failing prior to the actions at issue here, and in asserting that this contention is contrary to his allegations regarding IASA's financial condition, Resp. Br. 2, respondent has missed the point of our limited factual discussion. We do *not* seek at this juncture to involve this Court in the factual controversy regarding IASA's actual financial condition as of early 1986. On the other hand, the undisputed record shows that federal regulators received audit reports at that time indicating serious troubles at IASA. U.S. Br. 8-9. Whether or not those reports may ultimately be proved incorrect, their very existence in 1986—which is *not* disputed [11]—lays to rest any doubt that the actions challenged in this case arose in the context of regulatory concerns regarding the health of a thrift institution.

2. Respondent also attempts to divorce this case from its regulatory context by his repeated assertions that the federal officials who took actions regarding IASA "abandoned their role as regulator," Resp. Br. 2-3, 15, 27 n.15, and engaged in an "extraregulatory take-over" of the institution. *Id.* at 6, 31. Stripped of rhetorical flourishes, these assertions simply imply that the actions of the federal regulators here were beyond the proper scope of their discretion. In so arguing, respondent seems to be confusing the present damages action under the FTCA with an action for judicial review under the Administrative Procedure Act. In an action of the latter sort, it would of course matter if the regulatory actions at issue were arbitrary, capricious, or constituted an abuse of discretion. See 5 U.S.C. 706. To suppose that such arguments are relevant in the present case, however, exhibits a fundamental misunderstanding of the Federal Tort Claims Act and the discretionary function exception. In enacting that exception, Congress specifically intended that claims of abuse of discretion *not* be cognizable in tort actions against the United States. See U.S. Br. 20-21 (discussing FTCA legislative history).

At times, respondent's arguments in this regard seem to invoke the central principle of *Berkovitz* v. *United States*, *supra*, that the discretionary function exception is inapplicable where federal officials violate a "specifically prescribe[d] * * * course of action." 486 U.S. at 536; see, *e.g.*, Resp. Br. 14 ("officials acted outside federal regulatory policy"), 26 n.14 (actions "*outside* the permissible realm of choice"). As respondent elsewhere admits, however, existing regulatory policies did *not* dictate what specific actions federal regulators should take in their informal supervision of a thrift's activities. *Id.* at 14. As the court of appeals itself noted, the discretionary actions at issue here were not "closely guided by statute" or regulation, and the central holding of *Berkovitz* is not pertinent here. Pet. App. 11a-12a. Furthermore, as the court of appeals also noted, the authority of federal thrift regulators to engage in informal supervision of regulated institutions in circumstances like this, in lieu of more formal regulatory actions, is well established,

[11] Although respondent has repeatedly (and erroneously) objected to the use of the background information submitted in the district court, *e.g.*, Resp. Br. 3-4 & n.2, he has never presented any factual refutation to any part of it. His belated and conclusory statement that he "dispute[s]" the materials submitted below, *id.* at 4 n.2, is an inadequate basis for requiring this Court to ignore basic background facts that were adduced and unrebutted below.

and indeed was "unchallenged." *Id.* at 12a; see U.S. Br. 26-27.

Respondent now challenges that authority in two respects. First, he invokes FHLBB's own written policy to deny that federal regulators may ever use informal means to influence the activities of a troubled thrift institution. See Resp. Br. 6-7 n.3, 27 n.15, 44 n.26. But respondent misreads the FHLBB's policy, which expressly gives regulatory officials a *choice* between informal supervisory actions and formal enforcement actions. FHLBB Res. No. 82-381 (May 26, 1982), *reprinted at* Resp. Br. App. 4a-5a. Although the written policy further provides that the choice between such formal and informal measures should be guided by the seriousness and immediacy of the peril facing the institution, Resp. Br. App. 5a, such choices obviously involve a high degree of regulatory discretion. Nowhere in the FHLBB policy is there anything approaching the mandatory language in the FDA regulations at issue in *Berkovitz*.

Second, respondent argues that IASA's allegedly sound financial condition "precluded" any regulatory intervention, whether formal or informal. Resp. Br. 2, 24 n.13, 39 n.23. Here again, respondent labors under the misimpression that he can prevail by showing that the challenged actions lacked a solid factual foundation or otherwise constituted an abuse of discretion. Whether or not it is ultimately determined to be well founded, a decision by federal financial regulators that regulatory intervention is called for in a particular situation is (as the court below acknowledged) the most obvious sort of discretionary decision. In the absence of any violation of a "specifically prescribe[d] * * * course of action," *Berkovitz*, 486 U.S. at 536, respondent's arguments that the regulatory actions taken here were improper or without sufficient foundation simply do not advance his case.

A related aspect of the actions at issue here is that, notwithstanding respondent's characterization, Resp. Br. 32 n.19, the alleged "take-over" of IASA was necessarily

limited to attempts to advise or influence IASA. Indeed, respondent's Amended Complaint is devoid of any factual allegation that federal officials had physically taken control of IASA's assets or had the authority to act on behalf of that corporation. What the Amended Complaint actually alleged is that federal officials "gave advice and made recommendations" concerning a variety of corporate activities. See Amended Compl. paras. 33, 34, J.A. 13-16; U.S. Br. 37-39. Moreover, this limitation is inherent in the nature of the informal supervision that occurred here. The only reason why suasion is effective, after all, is the possibility that federal regulators may undertake more drastic regulatory measures instead. Federal regulators in this posture simply have no legal means of directing an institution's activities, except to the extent that an institution's management decides it is in the firm's best interest to comply with the regulators' advice.[12] If the managers and directors of an institution believe that following the proffered advice will be harmful to the institution, they are free to ignore it, especially if—as respondent contends was the case here—they are confident that the institution is financially sound and therefore that there is no adequate basis for formal enforcement measures. Cf. Resp. Br. 2.[13]

3. One of respondent's principal arguments is that no "policy" discretion was at issue here, because federal

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[12] The FHLBB's written policy recognizes that the advisability of even undertaking informal supervisory actions will turn in large part on federal officials' "assessment of management's willingness to take appropriate corrective actions." FHLBB Res. No. 82-381, *supra*, *reprinted at* Resp. Br. App. 5a.

[13] Where there is a substantial basis for further enforcement measures, on the other hand, the pressure on thrift management to accede to informal supervision may be great indeed—a fact we have no "reluctance" to acknowledge. See Resp. Br. 32 n.19. In our view, however, this nexus between admittedly discretionary enforcement initiatives and the sort of informal supervision at issue here only makes more clear the discretionary, policy-based character of that supervision.

regulators had to apply "professional and technical" principles in taking the actions at issue. In making this argument, respondent presumes that the decisions made by those officials called only for the same sort of "thrift management judgment" that thrift managers themselves exercise, based on "professional experience and developed technical expertise." Resp. Br. 33. But respondent overlooks the fact that federal regulators are *not* thrift managers and necessarily approach even "operational" decisions regarding the affairs of a thrift from a distinct perspective, guided by federal regulatory policies. As FHLBB's own written policy reflected, federal regulators become involved in supervisory actions regarding the management of an individual institution only when they have determined that (a) violations warranting regulatory intervention have occurred, and (b) more formal enforcement measures are not required. FHLBB Res. No. 82-381, *supra*, *reprinted at* Resp. Br. App. 5a. The goals of formal intervention are essentially the same as the goals of informal suasion: "to prevent the continuation of violations or practices that may result in financial harm to the institution, its customers, or [federal insurance funds]." *Ibid.* Cf. *Woods* v. *FHLBB*, 826 F.2d 1400, 1411 (5th Cir. 1987) (goal of regulatory activities is "to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds"), cert. denied, 485 U.S. 959 (1988).

Accordingly, the actions of federal regulators engaging in informal supervision of financial institutions are inextricably bound up with regulatory policies. Individual decisions regarding the kind of guidance to give are necessarily geared to the ultimate regulatory policies of minimizing losses to federal insurance funds and fostering public confidence in the savings and loan industry.[14]

[14] Ironically, respondent chastises federal officials for promoting the merger between IASA and Investex, implying that these officials permitted a questionable merger to go forward in the hope of avoiding the $40 to $50 million loss to federal insurance funds that the failure of Investex by itself might cause. Resp. Br. 42-43 n.25. Whether or not respondent's criticisms of federal officials have any validity on the merits, they merely reinforce the proposition that federal officials were approaching these issues as matters of public policy. In any event, these particular decisions were among those that the court of appeals held to be within the discretionary function exception, Pet. App. 13a-14a, a ruling from which respondent did not seek review.

Moreover, the discretionary choice between informal supervision and sterner regulatory measures is always subject to reevaluation, and regulators engaged in supervisory activities must consider whether particular corrective measures are likely to have sufficiently beneficial effects to justify continued forbearance from formal enforcement mechanisms.

There is, of course, an overlap of the skills brought to bear in making such decisions and the normal "professional and technical" skills employed by thrift managers themselves. But the same can be said of any regulatory decision—including the decisions of the individual inspectors in *Varig Airlines*, who necessarily drew on the same sort of "technical" skills employed by those in the aircraft industry. In particular, nearly any decision by federal regulators of financial institutions involves "professional" expertise. But this is not a reason to exclude all such decisions from the scope of the discretionary function exception. On the contrary, courts have recognized that such "subtle judgments * * * that draw upon a mix of law, accounting, bank custom, and policy" are precisely the kinds of decisions that Congress meant to protect from tort liability. *Golden Pacific Bancorp.* v. *Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988); see U.S. Br. 41-42 nn.29-30 and cases there cited. The agency decision-making in the present case involved this same "mix" of considerations. In advising IASA management regarding various ways of dealing with the institution's perceived difficulties, federal regulators certainly drew upon their knowledge

of "thrift management judgment." Nevertheless, the ultimate regulatory goals of such intervention required those officials also to consider the protection of federal insurance funds and the effects of an IASA failure on public confidence in the thrift industry. Thus, the actions taken here were indeed "grounded in social, economic, and political policy," and should not be " 'second-guess[ed]' * * * through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814.

Respondent seems to contend that the actions at issue here necessarily fall outside the scope of the discretionary function exception because they affected IASA's "day-to-day" operations. Resp. Br. 35. Under federal statutes, however, the thrift industry is subject to extensive regulation,[15] and the very purpose of regulatory initiatives is to influence just such operations. Certainly, the actions here become no less discretionary, and no less policy-oriented, simply because they were specifically tailored to a particular institution. As this Court's ruling in *Varig Airlines* makes clear, broadly applicable regulatory initiatives and specific applications of those initiatives are both encompassed within the discretionary function exception, as long as the particular action in question entails "policy judgment." 467 U.S. at 820. The actions at issue here necessarily involved such judgment, and

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[15] See U.S. Br. 2-4; see generally *Miami Beach Federal Savings & Loan Ass'n* v. *Callander*, 256 F.2d 410, 413-414 (5th Cir. 1958). As noted in our opening brief, Congress has recently made major changes to the statutory scheme of federal thrift regulation, but has not cut back on the pervasive nature of the regulatory scheme. See U.S. Br. 4-5 n.5 (discussing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183). Respondent errs in suggesting that FIRREA was adopted in response to the FHLBB's regulatory excesses. Resp. Br. 16-17, 45 n.27. FIRREA was intended to *strengthen* regulatory oversight of thrift institutions in view of the "crisis" created by the precipitous growth and poor management practices of many thrifts. H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 298-301, 302-308 (1989).

therefore are protected by the discretionary function exception.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed, and the action should be dismissed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

OCTOBER 1990

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* The Solicitor General is disqualified in this case.

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No. 89-1793

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
Petitioner,
v.
THOMAS M. GAUBERT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, U.S. SENATOR CHARLES GRASSLEY, U.S. REPRESENTATIVES DAN BURTON, FRED GRANDY, JIM LEACH, PATRICIA SCHROEDER, NORMAN SHUMWAY, AND THOMAS TAUKE, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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August 16, 1990

QUESTION PRESENTED

Whether supervisory actions that are taken by federal regulators of financial institutions and that require the exercise of policy discretion fall within the "discretionary function" exception to the Federal Tort Claims Act, regardless of whether those actions may be categorized as "operational" in nature.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nation-

wide. WLF believes that the tremendous increase in the number of lawsuits in our courts in recent years and the willingness of courts to recognize new legal theories under which to bring suit have adversely affected our free enterprise system. Accordingly, WLF devotes a substantial amount of time to finding ways to reduce litigation. To that end, WLF has appeared as *amicus curiae* before this Court as well as other federal and state courts in cases that touch upon efforts to control litigation growth. *See, e.g., Ingersoll-Rand Co. v. McClendon, cert. granted*, 58 U.S.L.W. 3657 (U.S. April 16, 1990); *Pacific Mutual Life Ins. Co. v. Haslip, cert. granted*, 58 U.S.L.W. 3628 (U.S. April 2, 1990); *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990).

Sen. Charles Grassley (Iowa) is a Member of the United States Senate. Reps. Dan Burton (Ind.), Fred Grandy (Iowa), Jim Leach (Iowa), Patricia Schroeder (Colo.), Norman Shumway (Calif.), and Thomas Tauke (Iowa) are Members of the United States House of Representatives. Each is vitally concerned that our nation's savings and loan industry be subject to sufficient federal government regulation to ensure its solvency, that costs to the taxpayers associated with failures of savings and loan institutions be kept to an absolute minimum, and that those responsible for S&L failures be made to reimburse the federal government for losses caused by those failures.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court on several occasions in cases dealing with the conflict between the rights of individuals and the collective rights of society.

Amici believe that the best interests of American taxpayers will be served if the Court does not permit suits brought under the Federal Tort Claims Act to go forward under circumstances such as those present in this case. *Amici* believe that the ability of federal officials to police the banking and S&L industries will be severely impaired if regulators must be concerned that their every action is subject to second-guessing in the federal courts.

Amici submit this brief on behalf of Petitioner with the written consent of both parties.

STATEMENT OF THE CASE

Amici are, in the interests of brevity, omitting any detailed statement of the facts of this case. *Amici* adopt by reference the statement of facts contained in Petitioner's brief.

In brief, Respondent Thomas Gaubert in 1983 acquired control of Citizens Savings and Loan Association, a federally insured thrift institution chartered by the State of Texas. Mr. Gaubert became chairman of the board, arranged for the institution to change its name to Independent American Savings Association ("IASA"), and embarked IASA on a meteoric expansion program. Mr. Gaubert's activities quickly brought him into conflict with officials at the Federal Home Loan Bank Board, the federal agency charged with overseeing IASA's activities, and the Federal Home Loan Bank of Dallas (referred to hereinafter collectively as the "Bank Board").

Disconcerted by what they viewed as Mr. Gaubert's improper management of IASA's affairs, Bank Board officials took a series of actions against Mr. Gaubert. In December 1984, Bank Board officials entered into an agreement with Mr. Gaubert whereby he agreed to resign from management positions at IASA, to refrain from any participation in the management of the institution, and to accept limitations on his ability to vote or transfer IASA stock. In December 1985, Mr. Gaubert -- faced with the threat that the Bank Board would commence a regulatory proceeding designed to bar him from involvement with any federally insured thrift -- signed an agreement with the Bank Board agreeing to remove himself permanently from IASA's management and not to serve as an officer or director of any federally insured thrift institution without prior approval. In April 1986, Bank Board officials -- by threatening further regulatory proceedings -- forced the resignation of IASA's board of directors and arranged the selection of a new board chosen by the Bank Board.

From that point on, Bank Board officials had a significant influence on the day-to-day operations of IASA. Respondent alleges that Bank Board officials regularly advised IASA's new management on such issues as the hiring of a particular individual to serve as a consultant, the placement of subsidiaries into bankruptcy, resolution of a pay dispute involving IASA officers, and litigation strategy.

IASA was closed in May 1987 and placed under federal receivership; taxpayer losses associated with IASA's failure have been estimated at approximately $400 million. While both parties agree that IASA was insolvent in May 1987, they disagree regarding how IASA got that way. Petitioner contends that Mr. Gaubert's management activities during 1983-84 led

directly to the institution's insolvency. Mr. Gaubert contends that when he relinquished control IASA was in a strong financial position, and that the Bank Board's subsequent, continual involvement in the institution's day-to-day management led to IASA's insolvency.

Mr. Gaubert filed suit against the U.S. government under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, claiming that he suffered $100 million in damages as a result of the Bank Board's negligent regulation of IASA's affairs. The district court dismissed the lawsuit, but the United States Court of Appeals for the Fifth Circuit reversed and remanded -- finding that the "discretionary function" exception to the FTCA did not bar Mr. Gaubert's suit. On June 18, 1990, this Court agreed to review the court of appeals' decision.

SUMMARY OF ARGUMENT

In adopting the FTCA, Congress permitted the United States to be subject to tort suits but placed very strict limits on the types of government actions that could form the basis for such suits. One such limitation is the "discretionary function" exception, 28 U.S.C. § 2680(a). That exception precludes FTCA challenges to legislative and administrative decisions grounded in social, economic, and/or political policy. The exception has its roots in the constitutional doctrine of separation of powers, for without it courts would repeatedly be called upon to second-guess policy judgments of the other branches of government.

Actions arising out of the regulatory programs of federal agencies are a classic example of "discretionary functions" that are virtually always exempt from FTCA challenge. Regulators virtually always have wide-rang-

ing discretion to take any one of a number of actions toward those whom they regulate, and courts have no business second-guessing the policy choices of regulators inherent in their choices of which actions to take. Only occasionally will a statute, regulation, or federal policy so restrict a regulator's options that it can be said that he lacks authority to apply his own discretion; only then will the discretionary function exception be inapplicable to the regulator's actions.

The regulatory system at issue here is one involving regulators who have been given extremely broad discretion to take whatever steps they believe are necessary to preserve the integrity of our nation's depository insurance system. Mr. Gaubert does not like the manner in which Federal Home Loan Bank Board officials regulated his thrift; but it cannot be denied that those officials had the authority to take all such regulatory actions, and they took such actions in the exercise of their discretionary authority. Accordingly, the discretionary function exception bars the suit that Mr. Gaubert has brought against the government.

Permitting suits such as Mr. Gaubert's to go forward would undermine regulation of the deposit insurance system. Regulators would likely become reluctant to use the informal regulatory methods that would be the most frequent targets of FTCA suits. Instead, regulators would be forced to begin formal regulatory actions at the first indication of any trouble at an institution, thereby increasing the costs of regulation to all concerned. Moreover, marshaling the government's limited resources for the defense of what would doubtless be a huge influx of lawsuits challenging the government's regulation of financial institutions would require the government to divert some of its resources away from efforts to recover the S&L bailout costs

from crooked S&L operators and away from efforts to bring crooked operators to justice.

ARGUMENT

I. THE ACTIONS OF FEDERAL REGULATORS AT ISSUE IN THIS SUIT ARE PROTECTED UNDER THE "DISCRETIONARY FUNCTION" EXCEPTION OF THE FEDERAL TORT CLAIMS ACT

This case requires the Court once again to define the scope of the "discretionary function" exception of the FTCA, 28 U.S.C. § 2680(a), which provides that the federal government may not be held liable under the FTCA based upon the exercise of a "discretionary function" by government agencies or employees.[1] While defining the precise contours of the discretionary function exception has proven to be a difficult task in view of § 2680(a)'s less-than-precise wording, the Court has had little difficulty in divining why Congress included the exception within the FTCA: "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through an action in

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[1] 28 U.S.C. § 2680(a) provides in relevant part:

> The provisions of [the FTCA] shall not apply to --
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

tort." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense [Varig Airlines]*, 467 U.S. 797, 814 (1984).

If one keeps in mind the purpose of the discretionary function exception (as enunciated in *Varig Airlines*), the resolution of the issues raised in this case is not difficult. The administrative actions being challenged in this case are securely grounded in social, economic, and political policies adopted by the federal government. Accordingly, any judicial second-guessing of those actions is wholly unwarranted.

A. While Not All Acts Arising Out of Regulatory Programs of Federal Agencies Are Covered Under the Exception, the Vast Majority of Such Acts Are Covered

In *Berkovitz v. United States* 486 U.S. 531, 108 S.Ct. 1954, 1959-60 (1988), this Court explicitly rejected the contention that the discretionary function exception "precludes liability for any and all acts arising out of the regulatory programs of federal agencies." The Court held that the plain language of the exception -- protection for "discretionary" functions rather than for "regulatory" functions -- precludes such a sweeping claim. *Id.*

Nonetheless, the legislative history of the FTCA and decisions of this Court make clear that Congress intended that the discretionary function exception apply to the vast majority of acts arising out of federal regulatory programs. For example, early drafts of bills that later became the FTCA included exceptions from the waiver of sovereign immunity for claims based on any and all activities of specific federal agencies, notably the Federal Trade Commission and the Securities and Exchange Commission. *See, e.g.*, H.R. 5373, 77th Cong., 2d Sess. (1942); H.R. 7236, 76th Cong., 1st Sess. (1940); S. 2690, 76th Cong., 1st Sess. (1939). Later drafts omitted those exceptions and replaced them with language identical to the language of § 2680(a) as ultimately adopted. Backers of the bill considered it "unnecessary to except by name such agencies as the Federal Trade Commission and the Securities and Exchange Commission, as had earlier bills, because the language of the discretionary function exception would 'exemp[t] from the act claims against Federal agencies *growing out of their regulatory activities*.'" *Varig Airlines*, 467 U.S. at 810 (emphasis added by court), *quoting* Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess. 8 (1942). In other words, Congress intended that, as a general rule, the regulatory activities of federal agencies not be subject to second-guessing in an FTCA suit.

In confirming that general rule in *Dalehite v. United States*, 346 U.S. 15 (1953), the Court quoted extensively from the legislative history of the FTCA. The Court cited language from the House Report on H.R. 6463 that explained that while "the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies," the discretionary function exception was "designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved." *Dalehite*, 346 U.S. at 29 n.21, *quoting* H.R. Rep. No. 2245, 77th Cong., 2d Sess. at 10. The Court gave a similar reading to the FTCA's legislative history

in *Varig Airlines*. *See id.*, 467 U.S. at 808-10. The Court said, "[W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.* at 813-14.

In sum, while *Berkovitz* teaches that the discretionary function exception does not provide a blanket immunity for any and all acts arising out of the regulatory programs of federal agencies, Congress did intend the exception to keep to a minimum judicial second-guessing of such acts.

B. Acts Arising Out of the Regulatory Programs of Federal Agencies Are Covered by the Exception Unless a Specific, Mandatory Requirement Restricts the Discretion of Agency Officials

As noted above, the Court in *Berkovitz* rejected a claim that the discretionary function exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies. Instead, the Court held that liability under the FTCA is not precluded where the plaintiff can establish that the challenged act violated a specific, mandatory requirement that restricted the discretion of the governmental employees performing the act. *Berkovitz*, 108 S.Ct. at 1961-62.

Berkovitz involved an FTCA claim based on the federal government's licensing of an oral polio vaccine; the plaintiff contracted a severe case of polio after ingesting a dose of the vaccine. *Id.* at 1957. The plaintiff asserted that a government regulatory body, the Division of Biologic Standards ("DBS"), had issued a license without first -- as was required by statute and

regulation -- receiving from the vaccine manufacturer certain product testing data. The Court held the discretionary function exception inapplicable to this claim because the DBS had "no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive." *Id.* at 1962.

While the Court in *Berkovitz* permitted the plaintiff's FTCA claim to go forward, it emphasized the limited nature of this ruling. The Court held that "Congress intended the discretionary function exception to apply to the *discretionary* acts of regulators, rather than to all regulatory acts." *Id.* at 1960 n.4. In other words, so long as a plaintiff cannot point to a statute, regulation, or other federal policy whose specific mandate a regulator has violated while performing his regulatory functions, the plaintiff has no cause of action under the FTCA.[2] *See* Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 Chi. L.Rev. 1300, 1333 (1987).

That point is well illustrated by the Court's discussion of a second theory of liability raised by the plaintiff in *Berkovitz*. The plaintiff apparently alleged

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[2] The Court summarized its holding in *Berkovitz* as follows: "[T]he discretionary functions exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 1959. Since § 2680(a) explicitly insulates from liability all discretionary activity "whether or not the discretion be abused," the phrase "permissible exercise" should be read to mean activity that does not violate a specific and mandatory requirement; it should not be interpreted so as to exclude instances in which a regulator is alleged to have abused his discretion. *See generally*, Fishback & Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 Idaho L.Rev. 291, 323 (1989).

that the federal regulatory body, DBS, had incorrectly and negligently determined that the polio vaccine manufacturer had complied with certain regulatory requirements. The Court said that the applicability of the discretionary function exception to this allegation turned on whether one could determine with objective certainty whether the manufacturer had complied with the regulatory requirements. *Id.* at 1963. The Court said that if, as alleged by the plaintiff, the issue of the manufacturer's compliance could be determined by reference to objective scientific standards, then the discretionary function exception was inapplicable because regulators would have no need to make any discretionary judgments in the course of making that determination. *Id.* On the other hand, the Court said, if the issue of compliance could not be determined with objective certainty but instead required regulators to use a degree of subjective judgment, then the plaintiff's claim was barred by the discretionary function exception. *Id.*[3] In other words, the plaintiff could avoid application of the discretionary function exception only by showing that the applicable regulations mandated a finding that the vaccine manufacturer did not meet the regulatory requirements and that regulators at DBS nonetheless made a contrary finding.

Mr. Gaubert has not alleged that Bank Board officials violated any statute, regulation, or federal policy that restricts the discretion of Bank Board officials. Rather, Mr. Gaubert has merely alleged that those officials were negligent in the management direction they

[3] The Court declined to rule on the issue due to the "scanty record" before the Court; rather, the Court directed the District Court on remand to determine whether one could determine with objective certainty whether the manufacturer met applicable regulatory requirements.

gave to IASA officers and directors during the performance of their regulatory duties. Complaint ¶ 39. Regardless of whether Bank Board officials may have been negligent or may have abused their discretion in giving such management direction, *Berkovitz* dictates that Mr. Gaubert's claims are barred by the discretionary function exception.

C. *Indian Towing* Is Inapplicable to the Facts of this Case and Does Not Support the Court of Appeals' Attempt to Distinguish Between Policy Decisions and Operational Actions

In reversing the district court's dismissal of Mr. Gaubert's complaint, the Fifth Circuit relied heavily on *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). *Indian Towing* is inapplicable to the facts in this case.

Indian Towing involved a claim under the FTCA for damages to cargo aboard a vessel that ran aground, allegedly owing to the failure of the light in a lighthouse operated by the Coast Guard. The plaintiffs contended that the Coast Guard had been negligent in inspecting, maintaining, and repairing the light. The Court found that the complaint stated a cause of action under the FTCA; however, the Court's decision did not touch upon the discretionary function exception, because the government had conceded the inapplicability of that exception. *Id.* at 64-65. The Court subsequently cited *Indian Towing* as a case that "illuminates the appropriate scope of the discretionary function exception." *Berkovitz*, 108 S.Ct. at 1959 n.3. The Court explained that while "the initial decision to undertake and maintain lighthouse service was a discretionary judgment, . . . the failure to maintain the lighthouse in good condition subjected the Government to suit under the

FTCA. . . . The latter course of conduct did not involve any permissible exercise of policy judgment." *Id.*

Indian Towing's holding in unexceptionable. Once a federal policy had been established to operate a particular type of lighthouse (a discretionary policy decision), operational-level Coast Guard personnel had no discretion to discontinue lighthouse operations. Accordingly, the discretionary function exception was inapplicable.

However, the Fifth Circuit misinterpreted *Indian Towing* as creating a distinction between "policy decisions" and "operational actions." *Gaubert v. United States*, 885 F.2d 1284, 1287 (5th Cir. 1989). The Fifth Circuit held that "policy decisions" (*e.g.*, the decision to operate a lighthouse) are covered by the discretionary function exception but that "operational actions" (*e.g.*, the failure to keep the lighthouse lighted, or the Bank Board's provision of day-to-day management advice to IASA) are not covered, even when the personnel undertaking such actions are empowered to exercise their discretion regarding how to carry out their duties. *Id.* There is no support in *Indian Towing* or any other decision of this Court for the policy decision/operational action distinction drawn by the Fifth Circuit. To the contrary, "operational action" is fully covered by the discretionary function exception provided that the action is discretionary in nature. *Varig Airlines*, 467 U.S. at 813. "[I]t is the nature of the conduct, rather than the status of the actor, that determines whether the discretionary function exception applies in a given case." *Id.*

Bank Board officials undeniably were engaged in discretionary conduct when they provided management advise to IASA. They were operating pursuant to regulatory statutes (principally, 12 U.S.C. §§ 1729 and 1730

(1988)) which gave them virtually unfettered discretion in dealing with federal insured institutions.[4] The mere threat that Bank Board officials would exercise some of their discretionary statutory powers generally was sufficient to permit them to wield considerable regulatory influence over such institutions.

The management advice given by Bank Board officials to IASA personnel no doubt can be characterized as being at the "operational" level. Nonetheless, they were able to exert such influence solely by virtue of their discretionary regulatory powers. Moreover, it cannot seriously be contested that the decision to exert their influence so as to affect day-to-day management decisions at IASA was "grounded in social, economic, and political policy" (*Varig Airlines*, 467 U.S. at 814); Bank Board officials were pursuing a policy they believed most likely to protect depositors and minimize risks to the banking system. Accordingly, the decision of Bank Board officials to use their regulatory powers in this manner is a discretionary decision fully protected by the discretionary function exception.

Properly understood, *Indian Towing* does not create a distinction between "policy decisions" and "operational actions." The government could not invoke the discretionary function exception in *Indian Towing* not because the failure to keep the lighthouse lighted was an "opera-

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[4] For example, § 1730(b)(3) provided that if certain conditions were met, the Federal Savings and Loan Insurance Corporation ("FSLIC") "may, if it shall determine to proceed further" terminate an institution's insured status; FSLIC "may" issue cease and desist orders if "in the opinion of the Corporation" an insured institution is engaged in prohibited conduct (§ 1730(e)); FSLIC "may" under certain circumstances suspend any individual as an officer or director of an insured institution "if it deems it necessary" (§ 1730(g)(3)).

tional action" but because an established federal policy denied Coast Guard officials the discretion not to keep the lighthouse lighted. *Berkovitz*, 108 S.Ct. at 1959 n.3. Other "operational actions" that the Coast Guard might have taken would have been fully covered by the discretionary function exception. For example, if the established federal policy merely provided that the Coast Guard was to maintain a lighthouse without mandating any specifications for the lighthouse, the discretionary function exception would prevent claims that the Coast Guard should have used a more powerful light or that the lighthouse should have been taller. *See Chute v. United States*, 610 F.2d 7, 14 (1st Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

The Fifth Circuit's policy decision/operational action distinction, were it good law, would necessitate a reversal of the results reached by this Court in *Dalehite* and *Varig Airlines*. In both of those cases, actions found to be protected by the discretionary function exception undoubtedly would be classified as "operational actions" under the Fifth Circuit's definition. *Dalehite* found the exception applicable to claims, *inter alia*, that the government was negligent in failing to police properly the storage and loading of potentially explosive fertilizer. *Varig Airlines* found the exception applicable to claims, *inter alia*, that the government was negligent in certifying the installation of a defective heater into an airplane. In rejecting the notion that the exception could not be applied to operational actions, the Court stated in *Varig*:

> [T]he "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgement and decision there is discretion.

Varig Airlines, 467 U.S. at 811, *quoting Dalehite*, 346 U.S. at 35-36.

Moreover, *Indian Towing* was based at least in part on the notion that once a federal policy of maintaining a lighted lighthouse was established, shippers could reasonably rely on that policy being carried out. There is no similar notion of reliance in this case. The statement of the Fifth Circuit to the contrary notwithstanding,[5] there is no basis for a claim that Bank Board officials conducted their discretionary regulatory activities for the benefit of IASA stockholders. Indeed, in construing analogous bank regulation statutes, the Ninth Circuit found no indication that Congress adopted those statutes for the purpose of protecting stockholders and directors of national banks. *Harmsen v. Smith*, 586 F.2d 156, 158 (9th Circuit 1978). In distinguishing *Indian Towing*, the Ninth Circuit said, "bank examiners are not beacons to light the path of erring directors or gulled stockholders." *Id.*

In sum, the Fifth Circuit's reliance on *Indian Towing* in this case is wholly misplaced. Nothing in *Indian Towing* supports the Fifth Circuit's contention that discretionary government activity is not covered by the discretionary function exception when performed at the operational level.

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[5] *Gaubert*, 885 F.2d at 1290.

II. THE ABILITY OF FEDERAL REGULATORS TO POLICE FINANCIAL INSTITUTIONS WILL BE SEVERELY IMPAIRED IF REGULATORS MUST BE CONCERNED THAT THEIR EVERY ACTION IS SUBJECT TO SECOND-GUESSING IN THE FEDERAL COURTS

The magnitude of the financial crisis facing the thrift industry cannot be overstated. That crisis led Congress in 1989 to overhaul the entire federal regulatory structure for thrift institutions, by enacting the Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA"). FIRREA created a new body, the Office of Thrift Supervision (OTS), to assume many of the oversight functions previously performed by the Bank Board. Congress directed OTS to be "vigilant and responsive" in its regulation of the nation's thrifts. H.R. Rep. No. 54, 101st Congress, 1st Session, Pt. 1, at 291 (1989).

The ability of OTS (as well as the Office of the Comptroller of the Currency ("OCC"), which performs a similar oversight role for banks) to police financial institution will be severely hampered if the Court permits FTCA suits alleging negligent supervision to go forward. Permitting such suits will inevitably bias regulators toward those more formal regulatory actions (such as appointment of a receiver) that are generally recognized as falling within the discretionary function exception,[6] thereby reducing the range of options avail-

[6] Even the Fifth Circuit recognized in this case that the discretionary function exception barred FTCA suits over the more drastic regulatory actions taken against IASA, such as the decision to (continued...)

able to OTS and OCC in responding to perceived problems at financial institutions.

Mr. Gaubert clearly is unhappy with the range of informal regulatory actions taken by Bank Board officials in their dealings IASA; Mr. Gaubert contends that those informal regulatory actions were so extensive that Bank Board officials had a significant say in all major management decisions made by IASA officials.[7] However, the alternative to those informal actions would have been drastic, formal regulatory actions against IASA, actions that likely would have displeased Mr. Gaubert at least as much. Moreover, OTS and OCC have finite resources and ought to be free to decide to conserve those resources by exercising informal "jawboning" regulatory tools, tools that require far fewer human resources than do formal regulatory proceedings.

[6] (...continued)
replace IASA's Board of Directors with individuals acceptable to the Bank Board. *Gaubert*, 885 F.2nd at 290.

[7] Mr. Gaubert apparently wishes the Court to treat the informal regulatory actions taken by Bank Board officials as tantamount to an actual takeover of IASA by those officials. However, none of the factual allegations in Mr. Gaubert's complaint would support a claim that Bank Board officials actually controlled IASA's management in any formal sense. IASA officers, directors, and stockholders were free at any time to take actions contrary to the Bank Board's wishes – subject, however, to the knowledge that Bank Board officials were more likely to initiate formal regulatory proceedings against IASA and its officers/directors if they failed to heed the officials' advice. Paragraph 40 of Mr. Gaubert's complaint demonstrates that IASA's officers, director, and stockholders fully understood that IASA was not under the direct control of Bank Board officials; Paragraph 40 indicates that in January 1987, stockholders defeated the Bank Board-endorsed slate of directors and replaced them with directors that had served on the board prior to the active involvement of Bank Board officials in IASA's affairs.

Regulatory officials view informal regulatory procedures -- such as voluntarily executed written agreements, letter agreements, and business plans -- as "a valuable informal method of guiding the institutions that have not deteriorated to the level of a formal enforcement action away from potential problems." Testimony of FDIC Chairman L. William Seidman before the Senate Judiciary Committee, July 24, 1990, at 22. If the Court forces OTC and OCC toward greater use of formal regulatory proceedings by finding the discretionary function exception inapplicable to this case, the Court will have impaired the ability of OTS and OCC to provide current levels of regulatory supervision within existing budgetary constraints. As the Court noted in *Varig Airlines*, Congress adopted the discretionary function exception to prevent just such impairment of federal regulatory activity:

> By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163 (1963).

Varig Airlines, 467 U.S. at 814.

Moreover, the government's ability to recover the costs of the S&L bailout from culpable S&L executives[8]

[8] The number of S&L executives suspected of wrongdoing in connection with the collapse of their S&L's is substantial. According to L. William Seidman, Chairman of the Federal Deposit Insurance Corporation, more than 50% of the thrifts controlled by the Resolution Trust Corporation ("RTC," the entity established under FIRREA to manage the assets of failed thrifts) have had (continued...)

will be impaired if limited resources have to be diverted to the defense of FTCA claims brought by those executives. Over 18,000 criminal referrals have been made to the Department of Justice over the past three years in connection with the thrift industry. Statement of Timothy Ryan, Director of OTS, before the Subcommittee on Criminal Justice of the Senate Judiciary Committee, July 24, 1990, at 6. The Department of Justice has been able to target only a fraction of those referrals. OTS, FDIC, RTC, and Justice Department representatives recently met to compile a list of the 100 criminal referrals that should receive the highest priority within the Justice Department. *Id.* at 6-7. The fact that such a list has had to be prepared underscores the federal government's inability to address fully all legal issues arising in connection with the S&L crisis. Allowing stockholders and creditors of failed thrifts to sue the federal government under the FTCA would compound the government's difficulty in addressing all such issues by draining away the legal staff required to defend the FTCA suits. As *Varig Airlines* states, Congress included the discretionary function exception within the FTCA to prevent the occurrence of just such a scenario. *Varig Airlines*, 467 U.S. at 814.

[8] (...continued)
suspected criminal conduct referred to the Department of Justice; in about 40% of RTC-controlled thrifts, insider abuse and misconduct contributed significantly to the thrift's insolvency. Testimony of L. William Seidman before the Senate Judiciary Committee, July 24, 1990, at 9. FDIC and RTC currently are conducting investigations of alleged wrongdoing at 1,300 thrifts and have filed more than 500 civil lawsuits against former directors, officers, and other professionals to recover damages ranging from $1 million to $1 billion. *Id.* at 13.

CONCLUSION

Amici curiae respectfully request that the decision of the court of appeals be reversed and that this case be remanded to the district court with orders that plaintiff's complaint be dismissed.

Respectfully submitted,

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